TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 24

NANCY K. McFEELY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 16, 1935.

CERTIORARI GRANTED MAY 20, 1935.

SUPREME COURT OF THE UNITED STATES

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United States Board of Tax Appeals.

DOCKET NO. 69492.

NANCY K. McFEELY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:
For Taxpayer: HARRY B. WASSELL, ESQ.;
For Commissioner: W. F. GIBBS, ESQ.

DOCKET ENTRIES.

Jan. 24, 1933. Petition received and filed. Taxpayer notified. (Fee paid.)

Jan. 24, 1933. Copy of petition served on General Counsel.

Mar. 25, 1933. Answer filed by General Counsel.

Mar. 31, 1933. Copy of answer served on taxpayer. General calendar.

Aug. 26, 1933. Hearing set Oct. 10, 1933.

Oct. 10, 1933. Hearing had before Mr. Smith on merits. Submitted. Stipulation of facts filed. Briefs none.

Oct. 16, 1933. Transcript of hearing of Oct. 10, 1933 filed.

Feb. 2, 1934. Findings of fact and opinion rendered, Charles P. Smith, Div. 5. Judgment will be entered for the respondent.

Feb. 6, 1934. Decision entered, Charles P. Smith, Div. 5.

Apr. 23, 1934. Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.

Apr. 27, 1934. Proof of service filed by taxpayer.

June 12, 1934. Præcipe filed by taxpayer.

June 14, 1934. Proof of service of præcipe filed.

June 22, 1934. Order enlarging time to 7/31/34 for transmission and delivery of record entered.

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 69492.

Nancy K. McFeely,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

PETITION.

(Filed January 24, 1933.)

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-1:GLN-60D), dated December 16, 1932, and as a basis of his proceeding alleges as follows:

1. The petitioner, Nancy K. McFeely, an individual, is a citizen of Pennsylvania, residing at 703 Main Street, Latrobe, Westmoreland County, Pennsylvania.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on December 16, 1932.

3. The taxes in controversy are income taxes for the calendar year 1929 and for thirty-five thousand three hundred seventy-two dollars and fifty-three cents ($35,372.53) additional assessment.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in refusing the petitioner's claim that profit on the sale of 1000 shares of Radio A common stock and 150 shares of American Window Glass Machine Company common stock, the absolute title to which was acquired in 1925 represented capital net gain under the provisions of Section 101 of the Revenue Act of 1928.

(b) The Commissioner erred in determining a deficiency of approximately $35,372.53 by eliminating $394,685 reported by the petitioner as capital net gain, and adding $404,085 as ordinary net profit on sales of stock.

(c) The Commissioner erred in determining in this case that the date which governs for gain or loss purposes under Section 113 (a) (5) of the Revenue Act of 1928 should be used also for determining what are "capital assets" and "capital gain" thus setting aside the provisions of Section 101 of said act giving the taxpayer the benefit of her capital gain and loss.

(d) The Commissioner erred in determining in this case that the basis for gain or loss of the taxpayer's donor is governed by Section 113 (a) (5) of the Revenue Act of 1928 and that November 3, 1927, the date which under said section would have been the date of distribution to the donor, is the date which governs the determination of capital net gain or loss.

(e) The Commissioner erred in refusing to determine that there was a constructive distribution of the Estate of T. H. Given, deceased, on May 20, 1925, the date when administration was completed, and thereby fixing that date as the basis for determining capital gain or loss.

(f) The Commissioner erred in refusing to determine that the widow donor acquired at the date of the death of her husband an absolute title to her interest in his Estate by electing to take against his will in lieu of her dower interest under the laws of Pennsylvania, thereby fixing June 28, 1919, as the basis for determining capital gain or loss.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(1) Nancy K. McFeely, the taxpayer, became the owner of 3500 shares of Radio Corporation of America "A" common stock and 1050 shares of the common stock of the American Window Glass Machine Company, and in 1929 sold 1000 shares of the Radio and 1050 shares of the American Window Glass Machine Company stock for a net profit of $394,685. This stock was part of an absolute gift to her from her mother, made under assignment dated June 23, 1924, and August 1, 1925, of a one-tenth interest in one-half of the Estate of T. H. Given, deceased, the husband of the donor, Martha A. Given.

(2) On June 28, 1919, T. H. Given died, leaving his widow, Martha A. Given, and no issue.

(3) On July 3, 1919, his will, dated October, 1918, was filed and probated in the Register's Office of Allegheny County, Pennsylvania.

(4) On July 3, 1919, nothing having been left to her under the will, Martha A. Given filed with the

executors in writing her election under the laws of Pennsylvania to take against his will one-half of his estate in lieu of her dower, and as there were no issue she thereby became the absolute owner of one-half of his estate.

(5) On July 3, 1919, letters testamentary were issued to George C. Moore and Arthur E. Braun and they proceeded to administer the estate.

(6) On August 2, 1919, the executors filed an inventory and appraisement of the Estate of T. H. Given, deceased, in the Register's Office of Allegheny County, Pennsylvania.

(7) In July, 1923, the first and partial account was filed by the executors at No. 594 September Term, 1923, in the Orphans' Court of Allegheny County, and owing to the fact that all the claims against the estate had not been fully discharged, the audit was continued, although by agreemeent between the executors and the distributees, a partial distribution of assets was made on September 29, 1923, and again on December 20, 1924.

(8) On June 23, 1924, an absolute assignment was made by Martha A. Given to Harry B. Wassell, in trust for the taxpayer, Mrs. Nancy K. Feely, of ten per cent. of her one-half interest in the estate of T. H. Given, deceased.

(9) In March, 1925, Martha A. Given reported this gift at its value as of June 23, 1924—the date of the gift—and paid a gift tax thereon in the sum of $2417.90.

(10) On March 6, 1925, the executors of the Estate of T. H. Given filed a second and partial account as of January 31, 1925. This account was audited on May 20, 1925, and at the time of the audit as required

by law, the executors submitted a sworn statement to the effect that all creditors whose claims the accountants had notice or knowledge of before the filing of this account had been paid; that all Federal taxes had been paid and substantially all state taxes, and that the executors had ample funds to meet the balance claimed by the state when the amount was ascertained. No other claims were later presented.

(11) On May 20, 1925, the Orphans' Court decreed a partial distribution, recognizing the assignment of the interest to Nancy K. McFeely, the taxpayer, and delivering to Harry B. Wassell, as her trustee, among other items 2000 shares of Radio Corporation of America "A" common stock and 900 shares of American Window Glass Machine Company common stock. Delivery of the balance of the assets, including 1000 shares of Radio "A" common and 150 shares of American Window Glass Machine Company common stock was suspended until the filing of the final account, it being understood that the executors should continue to hold the assets in kind and distribute the income therefrom quarterly to the beneficiaries.

(12) On August 1, 1925, by instruments duly executed, the gift to Mrs. Nancy K. McFeely, the taxpayer, was made absolute, and all the stock already distributed was turned over to her.

(13) In August, 1927, a third and partial account was filed by the executors at No. 84 October Term, 1927, in the Orphans' Court of Allegheny County, showing the payment of current taxes from the time of filing the account in 1925 to July 31, 1927, and showing the distribution of the income received during this period on the stock and bonds held by the executors to the beneficiaries, including the petitioner.

(14) Under date of November 3, 1927, a further delivery of the assets was made and there were de-

livered to Mrs. Nancy K. McFeely, the taxpayer, among other assets 1000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Company common stock, the subject of this controversy.

(15) On March 14, 1929, Nancy K. McFeely, the petitioner, sold said 1000 shares of Radio "A" common stock, which were a part of said gift, for the sum of $484,460. This stock had been valued for gift tax purposes as of June 23, 1924, at $20,625, and thus showed a net gain of $463,835.

(16) On December 19, 1929, she also sold said 1050 shares of American Window Glass Machine Company common stock which were a part of said gift for the sum of $19,950. This stock had been valued for gift tax purposes as of June 23, 1924, at $89,100, and thus showed a net loss of $69,150.

(17) In March, 1930, the petitioner filed her 1929 income tax report and reported as capital net gain the net profit of $394,685 on said sales, upon which she paid a capital gain tax of $49,335.63. In said report she set up June 23, 1924, the date of the gift to her, as the date she had acquired the said property sold, and used its value as of that date in determining the capital net gain reported.

(18) The donee taxpayer acquired the absolute property right, including the right to delivery in the property sold, on June 23, 1924, and August 1, 1925, and held it for more than two years, bringing it clearly within the provisions of Section 101 (c) (8) defining "Capital Assets" entitling her to the benefit of the capital gain provisions.

(19) The Commissioner determined that the 1000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Company common

stock sold were not property acquired by the donee taxpayer until the delivery on November 3, 1927, by the executors, because the date which governs for gain or loss purposes under Section 113 (a) (2) for the donor must be used as the date for determining what constitutes "capital assets" and "capital gain" under Section 101 (c) (8) (B) for the donee taxpayer.

(20) The Commissioner determined that said stock so sold did not constitute "capital assets" and that the profit was ordinary net profit, and on December 16, 1932, notified your petitioner that he had determined her tax liability for the year 1929 disclosed a deficiency of approximately $35,372.53 arising out of said change to net profit from capital net gain.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and determine that the property sold consisted of capital assets; that the petitioner is entitled to the benefit of the capital net gain provisions of the Revenue Act of 1928 in computing her 1929 tax on the property sold, and that there is no deficiency due from the petitioner for the year 1929.

HARRY B. WASSELL,
Attorney for Petitioner.
3106 Grant Building,
Pittsburgh, Pa.

STATE OF PENNSYLVANIA,
COUNTY OF ALLEGHENY, } *ss.:*

NANCY K. MCFEELY, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

MRS. NANCY K. MCFEELY.

Subscribed and sworn to before me this twenty-first day of January, A. D. 1933.

JAS. T. HUGHES,
(Seal) *Notary Public.*
My commission expires April 13, 1935.

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Dec 16 1932

Mrs. Nancy K. McFeely,
c/o Harry B. Wassell,
3106 Grant Building,
Pittsburgh, Pennsylvania.

Madam:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $35,372.53, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.

By
(Signed) J. C. Wilmer
Deputy Commissioner.

Inclosures:
Statement
Form 882
Form 870

STATEMENT

IT:AR:B-1
GLN-60D

In re: Mrs. Nancy K. McFeely,
c/o Harry B. Wassell,
3106 Grant Building,
Pittsburgh, Pennsylvania.

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1929	$84,803.09	$49,430.56	$35,372.53

The report of the Internal revenue agent in charge at Pittsburgh, Pennsylvania, a copy of which was furnished you, has been reviewed and approved with the following exception:

The capital net loss on the sale of 150 shares of the American Window Glass Machine Company as shown by exhibit C of the agent's report was $174.75 and the loss on the sale of 900 shares of this stock as shown by exhibit D was $64,048.50, resulting in a total capital loss of $64,223.28 instead of $59,446.18 as shown by the agent's report.

The adjustments in your income and the computation of your income tax liability follow:

Net income reported on return, line 18		$15,456.15
Capital net gain		394,685.00
Total net income reported		$410,141.15
Add:		
1. Interest	$2,135.47	
2. Interest on tax-free bonds	1,110.00	
3. Profit on sales	404,085.00	
4. Dividends	5,625.81	
5. Error in addition	100.00	413,056.28
		$823,197.43
Less:		
6. Fiduciary income	$3,800.00	
7. Capital net gain	458,908.25	462,708.25
Adjusted net income		$360,489.18
Computation of Tax		
Total net income adjusted		$360,489.18
Plus:		
Capital net loss included		64,223.25
Ordinary net income adjusted		$424,712.43

Less:		
Dividends	$9,179.56	
Interest on Liberty bonds	218.34	
Personal exemption		
Personal exemption	3,500.00	12,897.90
Net income subject to normal tax		$411,814.53
Normal tax at ½% on $4,000.00		$20.00
Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $403,814.53		16,152.58
Surtax on $424,712.43		76,602.49
Total		$92,855.07
Less:		
12½% of capital net loss	$64,223.25	8,027.91
Balance		$84,827.16
Less:		
Earned income credit	$1.87	
Tax paid at source	22.20	24.07
Income tax liability		$84,803.09
Tax previously assessed		49,430.56
Deficiency		$35,372.53

EXPLANATION OF CHANGES

1. The interest on bank deposits, notes, corporation bonds, etc. has been increased by $2,135.47 representing interest on bank deposits with the Peoples Pittsburgh Trust Company and interest on refund of Federal income tax not previously reported.

2. Interest of $1,110.00 on tax-free covenant bonds not originally reported has been included in your income.

3. The profit of $404,085.00 on the sale of 1,000 shares of Radio Corporation of America "A" has

been included in schedule 8. Your contention that the profit on the sale of this stock represented capital net gain under the provisions of Section 101 of the Revenue Act of 1928 for the reason that you acquired an absolute right in property of value in 1925 and sold such property in 1929, more than two years later, has been considered.

Section 101 (c) (8) (B) of the Revenue Act of 1928 provides as follows:

> "In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

It appears that the stock in question was acquired under an assignment by your mother of a portion of her interest in the Estate of T. H. Given and the basis for gain or loss purposes in accordance with section 113 (a) (2) of the Revenue Act of 1928 is the same as it would have been in your mother's hands. Therefore, the period during which your mother held the property should be added to the period it was held by you in order to determine the total period for which the particular property was held.

In this case, the decree of distribution of the stock was not made until November 3, 1927 and that date governs for gain or loss purposes under section 113 (a) (5) of the Revenue Act of 1928. In view of this fact it is inconsistent to hold that the stock was in your mother's hands prior to November 3, 1927, the date of the decree of distribution. That date which governs for gain or loss purposes, as the law specifically so provides, should be used also for capital gain pe-

termination. Since the Radio Corporation stock was sold on March 14, 1929, not having been held by you nor by the donor for a period of two years from November 3, 1927, the profit may not be considered capital net gain but is subject to both normal tax and surtax.

Careful consideration has been given the evidence furnished in your briefs and at conferences held in this office on March 17 and September 29, 1932, but no change can be made from the previous adjustment.

4. Dividends have been increased by $5,625.81 representing $3,657.06 received from the Estate of T. H. Given originally included in schedule 6 and $1,968.75, an understatement in the amount of dividends originally reported.

5. An error of $100.00 in addition of the income reported on your return has been corrected.

6. The amount of $3,800.00 included in schedule 6 as income from the Estate of T. H. Given has been eliminated and the correct amount of dividends is now included in the proper schedule.

7. The capital net gain of $394,685.00 has been eliminated and a loss of $64,223.25 allowed. This amount is the sum of the loss of $64,048.50 on the sale of 900 shares of stock of the American Window Glass Machine Company as shown in exhibit D and the loss of $174.75 the loss on the sale of 150 shares of American Window Glass Machine Company as shown by exhibit C of the agent's report.

Consent which will expire December 31, 1932, except as extended by the provisions of section 277 of the Revenue Act of 1928, is on file for the year 1929.

ANSWER.

(Filed March 25, 1933.)

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits that petitioner is an individual.

2. Admits that notice of deficiency was mailed to petitioner on December 16, 1932.

3. Admits that the taxes in controversy are income taxes for the calendar year 1929 in the amount of $35,372.53.

4. Denies that the Commissioner committed the errors alleged in subparagraphs (a) to (f), both inclusive, of paragraph 4.

5 (1) to (19). Denies the allegations of subparagraphs (1) to (19), both inclusive, of paragraph 5.

5 (20). Admits that in notice of deficiency dated December 16, 1932, profit on 1000 shares of "A" common stock of Radio Corporation of America, sold on March 14, 1929, was included in ordinary net income by reason of the fact that such stock was acquired by petitioner on November 3, 1927. Denies the remaining allegations of subparagraph (20) of paragraph 5.

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

FINDINGS OF FACT AND OPINION.

(Rendered February 2, 1934.)

UNITED STATES BOARD OF TAX APPEALS.

Nancy K. McFeely,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

DOCKET NO. 69492. PROMULGATED FEBRUARY 2, 1934.

On August 1, 1925, the petitioner was given by her mother a 10 per cent. interest in her share in the estate of T. H. Given, in process of administration. At that time the estate had on hand a large amount of securities and more than enough cash to pay its known or probable liabilities. The distributees had agreed to receive their shares in kind, which agreement was of record in court proceedings. On November 3, 1927, there were distributed to the petitioner 1000 shares of Radio "A" common stock which the petitioner sold on March 14, 1929, at a large profit. In her return for 1929 she reported the profit as capital net gain. The respondent taxed it as other profit, upon the ground that the shares had been held by the petitioner for a period of less than two years. *Held*, that the gain is taxable as other gain on sales of property held for a period of less than two years.

Harry B. Wassell, Esq., for the petitioner;
W. F. Gibbs, Esq., for the respondent.

This proceeding is for the redetermination of a deficiency in income tax for 1929 in the amount of $35,372.53. The questions in issue are:

(1) Whether the profit realized by the petitioner from the sale of 1000 shares of Radio "A" common

stock was a "capital net gain" or "ordinary net income."

(2) Whether the respondent erred in refusing to determine a constructive distribution of the estate of T. H. Given on May 20, 1925, and thereby establish that date as the date of acquisition by the petitioner of the stock sold.

(3) Whether the Commissioner erred in refusing to determine that the widow-donor acquired at her husband's death on June 28, 1919, an absolute title to her interest in the estate by her election to take against his will in lieu of her dower interest and thereby establish that date as the date of acquisition by the petitioner of the stock sold.

FINDINGS OF FACT.

1. On June 28, 1919, T. H. Given died, leaving his widow, Martha A. Given, and no issue.

2. On July 3, 1919, the will of T. H. Given was filed and probated in the register's office of Allegheny County, Pennsylvania. Martha A. Given was not mentioned in the will.

3. On July 3, 1919, Martha A. Given filed with the executors her election in writing to take against the will of her husband, T. H. Given, one-half of his estate in lieu of her dower under the laws of Pennsylvania. This election was duly filed and recorded in the recorder's office of Allegheny County. The Orphans' Court of Allegheny County recognized her election and she was duly awarded one-half of the estate under the laws of Pennsylvania.

4. On July 3, 1919, letters testamentary were issued to George C. Moore and Arthur E. Braun, and they proceeded to administer the estate.

5. On August 2, 1919, an inventory and appraisement of the estate of T. H. Given was filed in the register's office of Allegheny County by the executors.

6. In July, 1923, a first and partial account was filed by the executors of the estate of T. H. Given, deceased, at No. 594 September Term, 1923, in the Orphans' Court of Allegheny County. An audit of this account was continued as all the debts of the estate were not paid and the estate was not fully administered.

7. On July 23, 1924, an assignment was made by Martha A. Given to Harry B. Wassell in trust for Nancy K. McFeely of 10 per cent. of her one-half interest in the estate of T. H. Given. This instrument declared that:

> The said Harry B. Wassell, or his successor in trust, to collect, receive and hold the said interest in said estate in trust for the uses and purposes and with the powers following:
>
> In Trust to pay over from time to time the net income therefrom unto the daughter of said Martha A. Given, Mrs. Nancy McFeely, for and during all the term of her natural life, without being subject to debts, engagements or liabilities but freed and discharged therefrom, and without right of anticipation.
>
> In trust upon the death of Mrs. Nancy McFeely before me to pay over the principal and any unexpended balance of any income therefrom to such of my heirs as shall then be designated by me in writing.
>
> In trust upon the death of Mrs. Nancy McFeely after my death then to pay over the principal and any unexpended balance of any income thereof in the manner directed by me in my last Will and Testament, or if not so directed by me then to her nearest relative of my blood.

The validity of this assignment was recognized by the Orphans' Court and distribution decreed thereunder.

8. On March 16, 1925, Martha A. Given reported the gift to her daughter Nancy K. McFeely at its value as of June 23, 1924, the date of the gift, and paid a gift tax thereon in the sum of $2417.90.

9. On March 6, 1925, a second and partial account of the estate of T. H. Given was filed at No. 301 April Term, 1925, in the Orphans' Court of Allegheny County. At the audit of this account on May 20, 1925, the executors, under rule of court, filed a sworn statement representing, *inter alia:*

> (c) All creditors whose claims the accountants had notice or knowledge of before filing this account have been paid.
>
> (d) The estate is subject to the payment of direct and collateral inheritance taxes to the State of Pennsylvania and the payment of Federal Inheritance Tax. All Federal taves have been paid and substantially all state tax; but a balance claimed by the state is under negotiation which when ascertained, the Executors have ample funds to meet.
>
> . . . . . .
>
> (h) The names of all persons having any interest in the estate as legatees, heirs or next of kin, are as follows:
>
> Martha A. Given, widow, of full age;
>
> Arthur E. Braun and George C. Moore, Trustees for Annie Given Kerr (life tenant), of full age;
>
> Arthur E. Braun and George C. Moore (in remainder), of full age.
>
> (l) The property to be distributed under this account consists of stocks, bonds and cash and the parties in interest have elected to accept the same in kind; an agreement in respect thereto executed

by all the parties in interest is attached hereto, marked Exhibit "F". Under the said agreement, a portion of the securities and cash shown in this account shall be held by the executors and distribution thereof suspended until the filing of a final account.

On May 20, 1925, the Orphans' Court made the following decree:

> And now, to-wit, May 20, 1925, the accounts in this case having been filed and confirmed *nisi*, and having been examined by the Court, upon consideration thereof it is decreed that said accounts be confirmed absolutely, and it appearing that an agreement by the distributees has been filed providing for distribution of a portion of the fund in the hands of the Accountants, in kind, and distribution of the remainder to be suspended until the filing of a final account, it is ordered that the fund in the hands of the Accountants, to wit, $2,731,772.78, be paid in accordance with the schedule of distribution hereto attached and made part hereof, unless exceptions be filed within ten days, or on appeal be taken herefrom within three weeks.

Under this decree, Harry B. Wassell, as trustee for Nancy K. McFeely, received, *inter alia*, 900 shares of American Window Glass Machine Co. common stock. No further sale of assets was made by the executors and all of the stocks and bonds making up the remainder were later delivered in kind to the parties entitled thereto.

11. On August 1, 1925, an agreement was made and entered into by and between Martha A. Given, donor, and Nancy K. McFeely, donee, and Nancy K. McFeely as trustee, which provided in material parts as follows:

> Whereas, by assignment dated June 23rd, 1924, a copy of which is attached hereto, Martha A. Given conveyed to Harry B. Wassell, ten (10%) per cent. of all her right, title and interest in the Estate of Thomas Hartley Given, deceased, to be

collected by the said Harry B. Wassell and held in trust for Mrs. Nancy McFeely under the terms and conditions set forth in said assignment, and

WHEREAS, the said Harry B. Wassell has pretented his resignation as said Trustee and the said Martha A. Given has appointed Mrs. Nancy McFeely as his successor Trustee under the provisions of said instrument, copies of which resignation and appointment are hereto attached, and

WHEREAS, the said Martha A. Given, as the Donor, desires to give to the said Mrs. Nancy McFeely, in addition to the life interest already held by her in said trust, the absolute title and interest therein, and the said Mrs. Nancy McFeely desires to acquire absolutely all said property in which she now has a life interest.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That for One ($1.00) Dollar and other good and valuable considerations, to her in hand paid by the said Mrs. Nancy McFeely, it is agreed by and between the parties hereto as follows:

The said Martha A. Given, as Donor, agrees to the termination of said trust and to the transfer and conveyance to Mrs. Nancy McFeely, the present holder of the life interest therein, of the absolute right, title, interest, property, claim and demand of, in and to the said ten (10%) percent. interest in the Estate of Thomas Hartley Given, deceased, as and when collected for her by the said Harry B. Wassell, so that the said Mrs. Nancy McFeely shall then have and receive absolute title to said property, relieved of the conditions and provisions of said trust.

The said Mrs. Nancy McFeely, as Donee of said life interest and Trustee of said Trust estate, does hereby agree to the termination of said trust and to the transfer and conveyance to her absolutely of the said ten (10%) percent. interest in the Estate of Thomas Hartley Given, deceased, as and when collected by the said Harry B. Wassell.

On the same date Harry B. Wassell resigned as trustee of the estate created for Nancy K. McFeely by assignment of Martha A. Given dated June 23, 1924, and Martha A. Given by a separate instrument appointed Nancy K. McFeely to fill the vacancy caused by the resignation of Harry B. Wassell as trustee. The validity of these instruments was thereafter recognized by the Orphans' Court in making distribution thereunder.

12. On August 5, 1927, the third and partial account of the estate of T. H. Given was filed by the executors at #84 October Term, 1927, in the Orphans' Court of Allegheny County showing a balance of stocks, bonds, and cash, after distribution of May 20, 1925, of $1,339,108.93 (as per exhibit #6 attached to the stipulation).

13. On November 3, 1927, a further delivery of assets upon which distribution had been suspended was ordered and Nancy K. McFeely received, among other assets, certificates for 1,000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Co. common stock.

14. On March 14, 1929, Nancy K. McFeely sold the said 1,000 shares of Radio "A" stock which were a part of the gift for the sum of $484,460. This stock had been valued for gift tax purposes as of June 23, 1924, at $20,625, showing a net gain of $463,835.

15. On December 19, 1929, Nancy K. McFeely sold the said 1,050 shares of American Window Glass Machine Co. common stock which were a part of the gift for the sum of $19,950. This stock had been valued for gift tax purposes as of June 23, 1924, at $89,100, showing a net loss of $69,150.

16. In March 1930 Nancy K. McFeely filed her 1929 income tax return, claiming and reporting as

capital net gain a net profit of $394,685 on the sale of the Radio "A" common stock and American Window Glass Machine Co. common stock, upon which she paid a capital gain tax of $49,335.63. In such return she set up June 23, 1924, as the date she had acquired the property sold and used its value as of that date in determining the capital gain reported.

17. The respondent determined that there was a capital net loss on the sale of 150 shares of American Window Glass Machine Co. common stock of $174.75 and a capital net loss on the sale of 900 shares of this stock of $64,048.50, or a total capital loss of $64,223.25 as claimed by Nancy K. McFeely in her 1929 income tax return.

18. The respondent determined that there was an ordinary profit of $404,085 on the sale of 1,000 shares of Radio "A" common stock instead of a capital net gain of $463,835 as claimed by Nancy K. McFeely in her 1929 return. November 3, 1927, was used by the respondent as the basic date for his determination of gain or loss on the sale of 1,000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Co. common stock.

OPINION.

SMITH: The question presented by this proceeding is the amount of taxable profit realized by the petitioner from the sale of 1,000 shares of Radio "A" common stock on March 14, 1929, for the sum of $484,460, and whether the profit realized was a capital net gain or ordinary net income. The petitioner contends that, whatever the amount of the profit, it was a capital net gain within the meaning of the statute, and the respondent contends that it was ordinary net profit and not taxable under the capital net gain provisions of the statute. The contentions of the respondent are

set forth in his deficiency notice to the petitioner under date of December 16, 1932, as follows:

> 3. The profit of $404,085.00 on the sale of 1,000 shares of Radio Corporation of America "A" has been included in schedule 8. Your contention that the profit on the sale of this stock represented capital net gain under the provisions of Section 101 of the Revenue Act of 1928 for the reason that you acquired an absolute right in property of value in 1925 and sold such property in 1929, more than two years later, has been considered.

Section 101 (c) (8) (B) of the Revenue Act of 1928 provides as follows:

> "In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

It appears that the stock in question was acquired under an assignment by your mother of a portion of her interest in the Estate of T. H. Given and the basis for gain or loss purposes in accordance with section 113 (a) (2) of the Revenue Act of 1928 is the same as it would have been in your mother's hands. Therefore, the period during which your mother held the property should be added to the period it was held by you in order to determine the total period for which the particular property was held.

In this case, the decree of distribution of the stock was not made until November 3, 1927 and that date governs for gain or loss purposes under section 113 (a) (5) of the Revenue Act of 1928. In view of this fact it is inconsistent to hold that the stock was in your mother's hands prior to

November 3, 1927, the date of the decree of distribution. That date which governs for gain or loss purposes, as the law specially so provides, should be used also for capital gain determination. Since the Radio Corporation stock was sold on March 14, 1929, not having been held by you nor by the donor for a period of two years from November 3, 1927, the profit may not be considered capital net gain but is subject to both normal tax and surtax.

Section 101 of the Revenue Act of 1928, so far as is material to our determination, is as follows:

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

. . . . . .

(c) *Definitions.*—For the purposes of this title—

. . . . . .

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business) . . . For the purposes of this definition—

. . . . . .

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from

a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

Section 113 of the same act provides in material part as follows:

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

. . . . . .

(2) GIFT AFTER DECEMBER 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

. . . . . .

(5) PROPERTY TRANSMITTED AT DEATH.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market

value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

It will be noted from our findings that T. H. Given died testate on June 28, 1919. In his will he made no provision for his widow. The widow, on July 3, 1919, elected to take, against the will of her deceased husband, one half of his estate in lieu of her dower under the laws of Pennsylvania. By virtue of such election one half of the estate of her deceased husband vested in her immediately and absolutely. *Re Greiner's Appeal,* 103 Pa. 89. It was not, however, one half of the specific assets of the estate which became her property by virtue of the election, but only one half of the estate after the debts and other charges of administration should be paid. The basis for determining the gain or loss upon the sale in 1929 of personal property acquired by the widow, Martha A. Given, from the estate of her deceased husband was the value thereof at the date of distribution to her. Section 113 (a) (5), Revenue Act of 1928; *Ralph W. Harbison,* 26 B. T. A. 896.

The petitioner contends that there was a constructive distribution of the estate of T. H. Given on May 20, 1925; that in legal effect the 1,000 shares of Radio "A" common stock were distributed to Martha A. Given on that date and that Martha A. Given was the owner of them until they were given to the petitioner by virtue of the agreement of August 1, 1925;

that by virtue of section 101 (c) (8) (B) the time during which the securities were in the ownership of Martha A. Given should be added to the time during which the ownership was in the petitioner for the purpose of determining whether the profit realized upon the sale on March 14, 1929, was capital net gain or ordinary net income.

In our opinion the evidence does not support the contentions of the petitioner. While the shares of stock were in the custody of the executors of the estate of T. H. Given they were not in any proper sense "held" by the petitioner. If the executors by agreement of the parties or otherwise had sold the shares and realized a profit therefrom the profit would unquestionably have been taxable to the estate and not to the beneficiaries. *Anderson v. Wilson,* 289 U. S. 20.

It seems clear that if Martha A. Given had not assigned any portion of her estate to the petitioner, but had received the 1,000 shares of Radio stock in question on November 3, 1927, and had sold them on March 14, 1929, the profit would have constituted ordinary net income and would have been taxable accordingly, for she would have held them for a period of less than two years at date of sale. Section 113 (a) (5). We can not see that the petitioner stands in any better position than her donor.

Conceivably, if in 1929 the petitioner had sold, not the 1,000 shares of Radio stock in question, but her interest in the estate of T. H. Given, the profit would have constituted capital gain; for she acquired that interest by gift from her mother on August 1, 1925, and would have owned it for a period of more than two years at date of sale. But she did not sell the gift *res* or a fractional part of it. She sold shares of stock which were distributed to her by the executors of the estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the

executors of the estate and not in the petitioner. In view of these facts we think that it can not be said that the petitioner held them for a period of two years at the date of sale. *Johnson v. Commissioner* (C. C. A., 3d Cir.), 52 Fed. (2d) 726; *Schoenberg v. Burnet* (App. D. C.), 55 Fed. (2d) 543. *Contra, New York Trust Co., etc. v. Commissioner* (C. C. A., 2d Cir.), —— Fed. (2d) —— (Dec. 18, 1933). The respondent's contention on this point is sustained.

No contention is made by the petitioner as to the value of the 1,000 shares of Radio "A" common stock at the basic date, claimed by the respondent to be November 3, 1927. In the absence of evidence showing error on the part of the respondent in his determination, his valuation is approved.

Reviewed by the Board.

Judgment will be entered for the respondent.

DECISION.

(Entered February 6, 1934.)

Pursuant to the determination of the Board, as set forth in its report promulgated February 2, 1934, it is

ORDERED and DECIDED: That there is a deficiency of $35,372.53 for the year 1929.

(Sgd.) CHARLES P. SMITH,
Member.

PETITION OF NANCY K. McFEELY FOR REVIEW BY THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE THIRD CIRCUIT OF A DECISION BY THE UNITED STATES BOARD OF TAX APPEALS.

(Filed April 23, 1934.)

Nancy K. McFeely, the petitioner in this cause, by H. B. Wassell, counsel, hereby files her petition for a review by the Circuit Court of Appeals of the United States for the Third Circuit of the decision by the United States Board of Tax Appeals entered February 6, 1934, determining a deficiency of $35,372.53, in the petitioner's Federal Income Tax for the year 1929, and respectfully represents:

I.

The petitioner, Nancy K. McFeely, an individual, is a citizen of Pennsylvania, residing at 703 Main Street, Latrobe, Westmoreland County, Pennsylvania.

II.

NATURE OF THE CONTROVERSY.

The controversy involves generally the proper determination of the petitioner's liability for Federal income tax for the year 1929, and particularly whether profit on the sale of certain stocks was "capital net gain" or "ordinary net income."

The petitioner acquired title by gift from her mother, Martha A. Given, under assignments dated June 23, 1924, and August 1, 1925, to one-twentieth of the Estate of T. H. Given, deceased. A gift tax was assessed and paid on the specific assets comprising this gift by Mrs. Given on March 16, 1925. The estate had been administered by May 20, 1925, all debts having been paid, and the executors were holding under agreement the assets in kind pending delivery to the

parties entitled thereto. The petitioner and the other parties in interest, under said agreement to take in kind filed in the Orphans' Court, permitted the executors to retain the certificates evidencing the title to the stocks after May 20, 1925, and certain certificates were not delivered to her until November 3, 1927. Petitioner sold certain stock on March 14, 1929, which was over four years after she acquired title by gift but less than two years after delivery of the certificates.

Petitioner claimed that property sold was "capital assets" and the profit "capital gain," the date of the gift governing its determination as "capital assets."

Respondent held that the date of delivery of the certificates was the proper date for determining gain or loss, and it would be inconsistent to recognize the date of gift as the date governing the determination of capital assets; and therefore the profit was "ordinary net income."

The Board upholding the respondent held that although the petitioner could have sold the entire gift and the profit would have constituted "capital gain" nevertheless a sale at a profit of a specific portion of the gift would not constitute "capital gain" because the certificates evidencing the title of that specific portion had not been delivered to and held by your petitioner for more than two years.

III.

The petitioner being aggrieved by the conclusions of law contained in the opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Third Circuit.

IV.

ASSIGNMENTS OF ERROR.

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

(1) The determination that the profit realized by the petitioner from the sale of 1000 shares of Radio "A" common stock was "ordinary net income" and not "capital net gain."

(2) The determination that capital gain from the sale of capital assets under the requirements of Section 101 is reduced to "ordinary net income" because the basis of determining the gain as prescribed by Section 113 (a) (5) sets a date over two years after the date of the actual acquisition of the capital assets.

(3) The determination that the date which governs for gain or loss purposes in Section 113 (a) (5) of the Revenue Act of 1928 must be used in fixing the date of acquisition for capital gain determination under Section 101 (8) of said act, thereby voiding any previous holding period.

(4) The determination that the petitioner's basis for "capital gain or loss" in the sales in question was limited, reduced and restricted by Section 113 (a) (5) of the Revenue Act of 1928, and that November 3, 1927, is the date which governs the determination of capital net gain or loss.

(5) The refusal to determine a constructive distribution of the Estate of T. H. Given, deceased, on May 20, 1925, and to thereby establish that date as the date of acquisition by the petitioner of the stock sold, and thus determine the profit to be "capital net gain."

(6) The refusal to determine that, after the donor had acquired at her husband's death on June 28, 1919, an absolute title to her interest in his estate by her election to take against his will in lieu of her dower interest, her basis for determining capital gain or loss was June 28, 1919, and not the basis set up in Section 113 (a) (5) of the Revenue Act of 1928, and thereby

establish that date as the date governing the nature of the profit made by the petitioner on the stock sold.

(7) The Board erred in holding that although the profit on the sale by delivery of the equitable title would be capital gain, nevertheless, the sale by the delivery of the legal title to the same property would not be capital gain because the evidence of the legal title had not been held more than two years.

(8) The finding of the deficiency for the year 1929 of $35,372.53, in lieu of a determination that there was no additional income tax due from the petitioner for the year in controversy.

H. B. WASSELL,
Counsel for Petitioner,
3106 Grant Building,
Pittsburgh, Penna.

STATE OF PENNSYLVANIA,
COUNTY OF ALLEGHENY, } *ss.:*

H. B. WASSELL, being first duly sworn, says that he is counsel of record in the above-named cause; that as such he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

H. B. WASSELL.

Sworn to and subscribed before me this twentieth day of April, 1934.

LEO J. AARON,
(Seal) *Notary Public.*
My commission expires March 2, 1937.

STIPULATION OF FACTS.

(Filed October 10, 1933.)

It is stipulated and agreed between counsel for Nancy K. McFeely, petitioner, and counsel for the Commissioner of Internal Revenue, respondent, that the following facts are to be considered by the Board of Tax Appeals in the above-entitled case:

(1) June 28, 1919, T. H. Given died leaving his widow, Martha A. Given, and no issue.

(2) July 3, 1919, the will of T. H. Given was filed and probated in the register's office of Allegheny County, Pennsylvania. Martha A. Given was not mentioned in the will.

(3) July 3, 1919, Martha A. Given filed with the executors her election in writing to take against the will of her husband, T. H. Given, one-half of his estate in lieu of her dower under the laws of Pennsylvania. This election was duly filed and recorded in the recorder's office of Allegheny County, Pennsylvania, in Deed Book, Volume 2010, page 193. The Orphans' Court of Allegheny County recognized her election and she was duly awarded one-half of the estate under the laws of Pennsylvania.

(4) July 3, 1919, letters testamentary were issued to George C. Moore and Arthur E. Braun, and they proceeded to administer the estate.

(5) August 2, 1919, an inventory and appraisement of the Estate of T. H. Given was filed in the register's office of Allegheny County, Pennsylvania, by the executors.

(6) In July, 1923, a first and partial account was filed by the executors of the Estate of T. H. Given, deceased, at No. 594, September Term, 1923, in the Or-

phans' Court of Allegheny County, Pennsylvania. An audit of this account was continued as all the debts of the estate were not paid and the estate was not fully administered.

(7) June 23, 1924, an assignment was made by Martha A. Given to Harry B. Wassell, in trust for Mrs. Nancy K. McFeely, of 10 per cent. of her one-half interest in the Estate of T. H. Given. A true copy of said assignment being attached hereto as Exhibit No. 1. The validity of this assignment was recognized by the Orphans' Court and distribution decreed thereunder.

(8) March 16, 1925, Martha A. Given reported the gift to her daughter, Mrs. Nancy K. McFeely, at its value as of June 23, 1924, the date of the gift, and paid a gift tax thereon in the sum of $2417.90. This is of record in the United States Board of Tax Appeals in the case of Martha A. Given v. Commissioner of Internal Revenue, Docket No. 38236.

(9) March 6, 1925, a second and partial account of the Estate of T. H. Given was filed at No. 301, April Term, 1925, in the Orphans' Court of Allegheny County, Pennsylvania. At the audit of this account on May 20, 1925, the executors under Rule of Court filed a sworn statement representing, inter alia:

> "(c) All creditors whose claims the accountants had notice or knowledge of before filing this account have been paid.
>
> "(d) The estate is subject to the payment of direct and collateral inheritance taxes to the State of Pennsylvania and the payment of Federal Inheritance Tax. All Federal taxes have been paid and substantially all state tax; but a balance claimed by the state is under negotiation which when ascertained, the Executors have ample funds to meet.

"(1) The property to be distributed under this account consists of stocks, bonds and cash and the parties in interest have elected to accept the same in kind; an agreement in respect thereto executed by all the parties in interest is attached hereto, marked Exhibit "F". Under the said agreement, a portion of the securities and cash shown in this account shall be held by the executors and distribution thereof suspended until the filing of a final account."

A true copy of the executors' statement is attached hereto and marked Exhibit No. 2.

(10) May 20, 1925, the Orphans' Court decreed that $2,731,722.78 of the assets be paid and distribution of the remainder be suspended until the filing of a final account. Under this decree, Harry B. Wassell, as trustee for Mrs. Nancy K. McFeely, received inter alia, 900 shares of American Window Glass Machine Company common stock. A true copy of the decree is attached hereto, marked Exhibit No. 3. No further sale of assets was made by the executors, and all of the stocks and bonds making up the remainder were later delivered in kind to the parties entitled thereto.

(11) August 1, 1925, by instruments duly executed, the gift to Nancy K. McFeely was made absolute, true copies of said instruments being attached hereto as Exhibits No. 4 and No. 5. The validity of these instruments was thereafter recognized by the Orphans' Court in making distribution thereunder.

(12) August 3, 1927, the third and partial account of the Estate of T. H. Given was filed by the executors at No. 84 October Term, 1927, in the Orphans' Court of Allegheny County, Pennsylvania, showing a balance of stocks, bonds and cash, after distribution of May 20, 1925, of $1,339,108.93, as per Exhibit No. 6, attached hereto, which is a true copy of Schedules L, M, N and O.

(13) November 3, 1927, a further delivery of assets upon which distribution had been suspended was ordered, and Mrs. Nancy K. McFeely received among other assets certificates for 1000 shares of Radio "A" common stock, and 150 shares of American Window Glass Machine Company common stock. A true copy of the decree is hereto attached and marked Exhibit No. 7.

(14) March 14, 1929, Nancy K. McFeely sold the said 1000 shares of Radio "A" stock which were a part of said gift for the sum of $484,460. This stock had been valued for gift tax purposes as of June 23, 1924, at $20,625, showing a net gain of $463,835.

(15) December 19, 1929, Nancy K. McFeely sold the said 1050 shares of American Window Glass Machine Company common stock which were a part of said gift for the sum of $19,950. This stock had been valued for gift tax purposes as of June 23, 1924, at $89,100, showing a net loss of $69,150.

(16) In March, 1930, Nancy K. McFeely filed her 1929 Income Tax Report claiming and reporting as capital net gain a net profit of $394,685 on the sale of said Radio "A" common stock and American Window Glass Machine Company common stock, upon which she paid a capital gain tax of $49,335.63. In said report she set up June 23, 1924, the date of the gift to her, as the date she had acquired said property sold, and used its value as of that date in determining the capital gain reported. A true copy of said report is hereto attached as Exhibit No. 8.

(17) February 20, 1932, consent fixing the period of limitation upon assessment of 1929 Income and Profit Tax as of December 31, 1932, was filed by Nancy K. McFeely.

(18) The Commissioner determined that there was a capital net loss on the sale of 150 shares of American Window Glass Machine Company common stock of $174.75, and a capital net loss on the sale of 900 shares of this stock of $64,048.50, or a total capital loss of $64,223.25, instead of $69,150, as claimed by Nancy K. McFeely, in her 1929 tax report.

(19) The Commissioner determined that there was an ordinary profit of $404,085 on the sale of 1000 shares of Radio "A" common stock instead of a capital net gain of $463,835 as claimed by Nancy K. McFeely in her 1929 report. November 3, 1927, was used by the Commissioner as the basis for his determination of gain or loss on 1000 shares of Radio and 150 shares of American Window Glass Machine Company.

(20) December 16, 1932, the Commissioner notified petitioner that the determination of her tax liability for the year 1929 disclosed a deficiency of $35,372.53 arising principally out of said change from capital net profit to ordinary net profit.

H. B. WASSELL,
Counsel for Petitioner.
E. BARRETT PRETTYMAN,
Counsel for Respondent.

EXHIBIT NO. 1.

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS

WHEREAS, Thomas Hartley Given, late of Pittsburgh, Penna., died on the 28th day of June, 1919, seized and possessed of certain real and personal estate having first made and published his last Will and

Testament, which was duly probated, registered and recorded in the Register's Office of Allegheny County, Pennsylvania, in Will Book Vol. 155, page 603, and

WHEREAS, Arthur E. Braun and George C. Moore, who were appointed executors of said Will, duly proved the same and took upon themselves the execution thereof, and

WHEREAS, Martha A. Given, widow of the said Thomas Hartley Given, deceased, by an election dated the 3rd day of July, 1919, and duly delivered to the said executors and recorded in the Recorder's Office of Allegheny County in Deed Book Vol. 2010, page 193, and duly filed with the Clerk of the Orphans' Court of Allegheny County, has elected to take against the Will of said decedent and is thereby entitled to receive and collect from said executors one-half of the estate of said Thomas Hartley Given.

NOW THEREFORE, for One ($1.00) Dollar and other good and valuable consideration unto her in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said Martha A. Given has granted, bargained, sold, released, conveyed, assigned, transferred and set-over and by these presents does grant, bargain, sell, release, convey, assign, transfer and set-over unto Harry B. Wassell, his heirs and assigns, Ten (10%) per cent of all her right, title and interest, property, claim and demand of every kind and nature whatsoever in law or equity, vested or contingent, of, in and to the estate, real and personal of Thomas Hartley Given aforesaid, late of Pittsburgh, Pa., deceased, to which she is entitled by law as his widow, whether payable now or at any time hereafter, and whether the same be vested or contingent, and to all and every or any part thereof as the same shall or may become due and payable by and

under the laws of Pennsylvania or the United States or in any other way whatsoever.

To Have and to Hold the premises hereby granted, conveyed and assigned with the appurtenances unto the said Harry B. Wassell, his heirs, successors and assigns forever.

And the said Martha A. Given, for herself and for her heirs, executors and administrators does by these presents covenant with the said Harry B. Wassell, his heirs and assigns, against all claimants the said premises and every part thereof to Warrant and Defend.

And the said Martha A. Given does hereby severally nominate, constitute and appoint said Harry B. Wassell, his executors or administrators, her true and lawful attorney, irrevocable, with full power of substitution of other attorneys, to ask, demand, sue for, recover and receive, the said interest, property, claim and demand of, in and to the estate hereinbefore particularly set forth, from the said executors or from any other person or persons whatsoever, and to compound, release, acquit and discharge the same and every or any part or parcel thereof, and upon receipt of the same or any part thereof acquittances and other proper discharges to make, and generally for her and in her name or in the names of her executors or administrators, to make, do, perform, and execute all and every such further acts, matters and other things requisite or necessary and that as fully as the said Martha A. Given, or her executors or administrators, could or might have done, hereby ratifying and confirming all and whatever he or they shall lawfully do or cause to be done in or about the premises by virtue hereof.

And the said Martha A. Given, for herself, and for her heirs, executors and administrators, does hereby covenant with the said Harry B. Wassell, his heirs and assigns, that she and her heirs, executors, administrators and assigns, at the request and at the charges of

the said Harry B. Wassell, his heirs and assigns, shall and will from time to time execute and acknowledge and deliver and cause to be executed, acknowledged and delivered, all and any such further conveyances and instruments in writing for the better assuring to the said Harry B. Wassell, his heirs and assigns, of the premises and interest in said estate as above conveyed or intended to be conveyed, as the said Harry B. Wassell, his heirs and assigns shall reasonably advise and acquire.

The said Harry B. Wassell, or his successor in the trust, to collect, receive and hold the said interest in said estate in trust for the uses and purposes and with the powers following:

In trust to pay over from time to time the net income therefrom unto the daughter of said Martha A. Given, Mrs. Nancy McFeely, for and during all the term of her natural life, without being subject to the debts, engagements or liabilities but freed and discharged therefrom, and without right of anticipation.

In trust upon the death of Mrs. Nancy McFeely before me to pay over the principal and any unexpended balance of any income therefrom to such of my heirs as shall then be designated by me in writing.

In trust upon the death of Mrs. Nancy McFeely after my death then to pay over the principal and any unexpended balance of any income thereof in the manner directed by me in my last Will and Testament, or if not so directed by me then to her nearest relative of my blood.

The said Harry B. Wassell as trustee or his successor in the trust shall have the power at any time to do all or any of the said things following:

(1) To sell and convert, at public or private sale, all or any part of the securities received from said estate, at such times, for such prices, and upon such terms as he shall deem proper, hereby giving him full

power and discretion with respect thereto; to execute all notes, bonds and other evidences of indebtedness, payable when, and containing such provisions as he may deem proper in order to extend or continue the indebtedness owing by the executors of said estate until he shall deem it wise to convert said interest in said estate into cash; to make and deliver deeds, bills of sale, assignments, or other assurances necessary to vest good and sufficient titles in the purchasers in and to the property which he may sell, without liability on the part of the purchasers to see to the proper application of the purchase money, but nothing herein contained shall be construed to be a direction to said trustee to sell or convert said interest in said estate, real, personal or mixed, or any part thereof, into cash until he shall deem it necessary and proper so to do, for the purposes of this trust.

(2) To hold and retain any investments received by him in distribution in kind from the said estate of Thomas Hartley Given, deceased.

(3) To invest and reinvest, alter, vary and change investments and reinvestments from time to time at discretion.

(4) To demand, receive, collect and receipt for all income arising out of said interest in said estate and investments made hereunder.

(5) In his discretion and without liability for any loss that may be incurred thereby, to act with the same powers over the trust property that he would possess were he the actual owner thereof, without being limited in holding or making investments to securities required for trustees under the laws of Pennsylvania, or any other of the United States of America.

In the event of the death or resignation of said Harry B. Wassell, the right is reserved by said Martha

A. Given, if then living, to select a successor trustee, or if after her death, then said Mrs. Nancy McFeely shall have the right to select a trust company as a successor trustee.

WITNESS the hand and seal of the said Martha A. Given, this twenty-third day of June, A. D. 1924.

(Signed) Mrs. Martha A. Given (SEAL)

Attest:

(Signed) James J. Murphy, Jr.
(Signed) Phyllis Zund, c/o American Consulate, Lucerne, Switzerland.

(25¢ Documentary Stamp cancelled 10/1/24 M.A.G.)

Confederation of Switzerland,
Canton and City of Lucerne,
Consulate of the United States of America. } :ss.

On this Twenty-third day of June, A. D. 1924, before me a Consul of the United States of America, in and for Lucerne, Switzerland, came the above named Martha A. Given, widow, and she acknowledged the foregoing indenture to be her act and deed to the end that it may be recorded as such.

WITNESS my hand and Seal of the Consulate of the United States of America at Lucerne in the Confederation of Switzerland. (Signed) James J. Murphy, Jr.

Seal of American Consulate, Lucerne, Switzerland.

Consul of the United States of America.

Service No. 273.
Fee $2.00
Francs 11. 60

American Consular Fee Stamp $2.00 cancelled "American Consulate, Jun 23 1924, Lucerne, Switzerland".

EXHIBIT NO. 2.

IN THE
ORPHANS' COURT OF ALLEGHENY COUNTY
STATE OF PENNSYLVANIA

ESTATE OF THOMAS HARTLEY GIVEN, Deceased.	No. 301 April Term, 1925 No. 594 September Term, 1923. AUDIT STATEMENT FOR DISTRIBUTION Testacy.

The statement of Arthur E. Braun and George C. Moore, executors of the Last Will and Testament of Thomas Hartley Given, deceased, respectfully represents:

(a) The decedent died June 28, 1919, testate, and at that time was domiciled in the United States, and resided in the City of Pittsburgh, County of Allegheny, Pennsylvania, and letters testamentary on his estate (a copy of same and the will being hereto attached marked Exhibit "A") were granted July 3, 1919.

Letters were advertised in the Pittsburgh Post and the Pittsburgh Legal Journal on the 26th day of July, the 2nd, 9th, 16th, 23rd and 30th days of August, 1919, respectively, and proofs of publication marked Exhibit "B" are hereto attached.

An inventory and supplemental inventory, copies of which are hereto attached and marked Exhibits "C" and "D", were filed in the office of the Register of Wills of Allegheny County on the 2nd day of August, 1919.

(b) Widow's exemption of $500.00 claimed.

(c) All creditors whose claims the accountants had notice or knowledge of before filing this account have been paid.

(d) The estate is subject to the payment of direct and collateral inheritance taxes to the State of Pennsylvania and the payment of Federal Inheritance Tax. All Federal taxes have been paid and substantially all state tax; but a balance claimed by the state is under negotiation which when ascertained, the Executors have ample funds to meet.

(e) Decedent was married at the time of his death. His widow, Martha A. Given, on the 3rd day of July, 1919, filed an election to take against the will, said election being recorded in the Recorder's Office of Allegheny County in Deed Book Vol. 2010, Page 193, and a copy of said election is hereto attached marked Exhibit "E".

(f) No children were born to decedent after the date of the will.

(g) There is no intestacy as to any part of the estate.

(h) The names of all persons having any interest in the estate as legatees, heirs or next of kin, are as follows:

Martha A. Given, widow, of full age.

Arthur E. Braun and George C. Moore, Trustees for Annie Given Kerr (life tenant), of full age;

Arthur E. Braun and George C. Moore (in remainder), of full age.

(i) All of said parties in interest are living.

(j) All parties other than creditors having an interest in the estate have had notice of the filing of this account.

(k) By agreement of all the parties in interest, the correct amount of income payable to Arthur E. Braun and George C. Moore, Trustees for Annie Given Kerr, is left open for adjudication upon the audit of the final account, and the payment and receipt of income heretofore made and made under this account is without prejudice to the rights of any party interested.

(l) The property to be distributed under this account consists of stocks, bonds and cash and the parties in interest have elected to accept the same in kind; an agreement in respect thereto executed by all the parties in interest is attached hereto, marked Exhibit "F". Under the said agreement, a portion of the securities and cash shown in this account shall be held by the executors and distribution thereof suspended until the filing of a final account.

(m) Partial distribution has been made to the parties in interest as shown by this account and a first and partial account filed at No. 594 September Term, 1923, for which credit is claimed.

(n) Certified copies of recorded assignments, purporting to be executed by Martha A. Given, assigning and transferring interests in her share of said estate, have been delivered to the accountants, viz: an assignment dated October 3, 1923, assigning and transferring ten per cent. (10%) of said interest to Harry B. Wassell, Trustee for Mrs. Elizabeth Kennedy Wheeler, now Elizabeth Kennedy Wheeler Lessinoff, an assignment dated June 23, 1924, assigning and transferring ten per cent. (10%) of said interest to Harry B. Wassell, Trustee for Nancy McFeely, and an assignment dated October 3, 1923, assigning and transferring ten per cent. (10%) of said interest to Harry B. Wassell in his own right. Copies of said instruments are hereto attached, marked Exhibits "G", "H" and "I".

WHEREFORE, your accountants ask that a distribution in kind be awarded to the persons entitled thereto, in accordance with Paragraphs (l) and (m) hereof.

(Signed) Arthur E. Braun
(Signed) George C. Moore
Executors of the Estate of Thomas Hartley Given, Deceased

Sworn and subscribed this
19th day of May, 1925.

(Signed) W. F. Aull,
Notary Public

My commission expires:
March 12, 1927

EXHIBIT NO. 3.

IN THE ORPHANS' COURT OF ALLEGHENY COUNTY, PENNSYLVANIA

In the matter of the ESTATE OF THOMAS HARTLEY GIVEN, Deceased.	No. 301 April Term, 1925. No. 594 Sept. Term, 1923.

DECREE

And now, to-wit, May 20th 1925, the accounts in this case having been filed and confirmed nisi, and having been examined by the Court, upon consideration thereof it is decreed that said accounts be confirmed absolutely, and it appearing that an agreement by the distributees has been filed providing for distribution of a portion of the fund in the hands of the Accountants, in kind, and distribution of the remainder to be suspended until the filing of a final account, it is ordered that the fund in the hands of the Accountants, to wit, $2,731,772.78, be paid in accordance with

the schedule of distribution hereto attached and made part hereof, unless exceptions be filed within ten days, or an appeal be taken herefrom within three weeks.

(Signed) Per Curiam

EXHIBIT NO. 4.

AGREEMENT

MADE AND ENTERED INTO by and between MARTHA A. GIVEN, of Pittsburgh, Pennsylvania, Donor, MRS. NANCY MCFEELY, of Latrobe, Pennsylvania, Donee, and MRS. NANCY MCFEELY, of Latrobe, Pennsylvania, Trustee.

WHEREAS, by assignment dated June 23rd, 1924, a copy of which is attached hereto, Martha A. Given conveyed to Harry B. Wassell, ten (10%) per cent. of all her right, title and interest in the Estate of Thomas Hartley Given, deceased, to be collected by the said Harry B. Wassell and held in trust for Mrs. Nancy McFeely under the terms and conditions set forth in said assignment, and

WHEREAS, the said Harry B. Wassell has presented his resignation as said Trustee and the said Martha A. Given has appointed Mrs. Nancy McFeely as his successor Trustee under the provisions of said instrument, copies of which resignation and appointment are hereto attached, and

WHEREAS, the said Martha A. Given, as the Donor, desires to give to the said Mrs. Nancy McFeely, in addition to the life interest already held by her in said trust, the absolute title and interest therein, and the

said Mrs. Nancy McFeely desires to acquire absolutely all said property in which she now has a life interest.

Now, Therefore, This Agreement Witnesseth: That for One ($1.00) Dollar and other good and valuable considerations, to her in hand paid by the said Mrs. Nancy McFeely, it is agreed by and between the parties hereto as follows:

The said Martha A. Given, as Donor, agrees to the termination of said trust and to the transfer and conveyance to Mrs. Nancy McFeely, the present holder of the life interest therein, of the absolute right, title, interest, property, claim and demand of, in and to the said ten (10%) per cent. interest in the Estate of Thomas Hartley Given, deceased, as and when collected for her by the said Harry B. Wassell, so that the said Mrs. Nancy McFeely shall then have and receive absolute title to said property, relieved of the conditions and provisions of said trust.

The said Mrs. Nancy McFeely, as Donee of said life interest and Trustee of said Trust estate, does hereby agree to the termination of said trust and to the transfer and conveyance to her absolutely of the said ten (10%) per cent. interest in the Estate of Thomas Hartley Given, deceased, as and when collected by the said Harry B. Wassell.

The parties hereto agree to indemnify and save harmless the said Harry B. Wassell, the former Trustee, of and from any and all liability whatsoever which may arise out of the termination of this trust and the transfer and delivery to the said Mrs. Nancy McFeely of the absolute title, interest and possession, of, in and to the said Trust property, in addition to the income therefrom to which she is entitled under said Trust.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this first day of August, A. D. 1925.

Witness:
A. M. Nevins (Sgd.)

(Sgd.) MRS. MARTHA A. GIVEN (SEAL)
Donor.

(Sgd.) MRS. NANCY McFEELY (SEAL)
Donee.

(Sgd.) MRS. NANCY McFEELY (SEAL)
Trustee.

STATE OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } ss:

Before me, a Notary Public in and for said County and State, came the above named MARTHA A. GIVEN, and acknowledged the foregoing Agreement to be her act and deed, to the end that the same may be recorded as such.

WITNESS my hand and notarial seal this first day of August, A. D. 1925.

(Sgd.) LEO J. AARON
Notary Public
My commission expires March 2, 1929
(Notarial Seal)

EXHIBIT NO. 5.

KNOW ALL MEN BY THESE PRESENTS

THAT I, Harry B. Wassell, of Pittsburgh, Pennsylvania, do hereby resign as Trustee of the Estate created for Mrs. Nancy McFeely by assignment of Martha A. Given, dated June 23rd, 1924.

WITNESS my hand and seal this first day of August, A. D. 1925.
Witness:

(Signed) HARRY B. WASSELL (SEAL)
(Signed) LEO J. AARON

KNOW ALL MEN BY THESE PRESENTS

THAT I, Martha A. Given, Donor of the Trust Estate for Mrs. Nancy McFeely created by me by assignment dated June 23rd, 1924, to fill the vacancy caused by the resignation of Harry B. Wassell as Trustee thereunder, do hereby select and appoint Mrs. Nancy McFeely Trustee, as his successor, under the right reserved by me in said assignment.

WITNESS my hand and seal this first day of August, A. D. 1925.
Witness:

(Signed) MRS. MARTHA A. GIVEN (SEAL)
(Signed) A. M. Nevius

EXHIBIT NO. 6.

ABSTRACT FROM THIRD ACCOUNT (JULY 31, 1927)

Balace After Distribution (of May 20, 1925), Consists of:		
Stocks per Schedule "L"	699,422.22	
Bonds per Schedule "M"	405,875.00	
Notes Receivable per Schedule "N"	100.00	
Cash per Schedule "O"	233,711.71	
Total		1,339,108.93

SCHEDULE "L".

STOCKS OWNED ESTATE OF THOMAS HARTLEY GIVEN, DECEASED.

	Shares	Inventory Value Per Share	Total
American Window Glass Machine Company, Common	3,000	75.00	225,000.00
American Window Glass Machine Company, Preferred	2,000	85.00	170,000.00
Gulf Oil Corporation of Pennsylvania	4,000	31.25	125,000.00
International Devices Company	11,250	9.55	107,500.00
Radio Corporation of America "A", common	30,000	1.03	30,900
Radio Corporation of America "A", Preferred	2,000	2.05	4,100.00
Radio Corporation of America "A", Preferred Capital Stock held by Union Trust Company of Pittsburgh under agreement dated September 9, 1926 between Arthur E. Braun and George C. Moore, Executors Estate of Thomas Hartley Given, Deceased, Westinghouse Electric and Manufacturing Company, Farmers Deposit Trust Company, Arthur E. Braun and George C. Moore, Trustees Estate of Thomas Hartley Given, Deceased, Annie Given Kerr, life tenant, Arthur E. Braun and George C. Moore, remaindermen, and Martha A. Given and joined in by Elizabeth K. Lessinoff, Nancy K. McFeely and Harry B. Wassell	18,000	2.05	36,922.22
Total			699,422.22

SCHEDULE "M".

BONDS OWNED.

United States Third Liberty Loan 4¼%	405,875.00

SCHEDULE "N".

NOTES RECEIVABLE.

N. E. Wycoff	100.00

SCHEDULE "O".

CASH.

Farmers Deposit National Bank	233,711.71

EXHIBIT NO. 7.

IN THE ORPHANS' COURT OF ALLEGHENY COUNTY, PENNSYLVANIA

In the Matter of the ESTATE OF THOMAS HARTLEY GIVEN, Deceased.	No. 84 October Term, 1927 No. 301 April Term, 1925 No. 594 September Term, 1923

DECREE

And now, to wit, November 3, 1927, the Accounts in this case having been filed and confirmed nisi, and having been examined by the Court, upon consideration thereof, it is decreed that said Accounts be confirmed absolutely, and it appearing that a Petition by the distributees has been filed providing for distribution of a portion of the fund in the hands of the Accountants, in kind, and distribution of the remainder to be suspended until the filing of a final Account, it is ordered that the funds in the hands of the Accountants, to wit, $617,111.71, be paid in accordance with the Schedule of Distribution hereto attached and made a part hereof, unless exceptions be filed within ten (10) days, or an appeal be taken herefrom within three (3) weeks.

(Signed) Per Curiam

PRÆCIPE FOR RECORD.

(Filed June 12, 1934.)

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, with reference to petition for review heretofore filed in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review filed by the petitioner in the above cause.

(6) Stipulation of facts with Exhibits Nos. 1 to 7.

(7) This præcipe.

H. B. WASSELL,
Counsel for Petitioner.
3106 Grant Building,
Pittsburgh, Penna.

CERTIFICATE.

I, B. D. GAMBLE, clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 48, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the præcipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this second day of July, 1934.

B. D. GAMBLE,
(Seal) *Clerk, United States Board of Tax Appeals.*

[fol. 56] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5545

NANCY K. McFEELY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

And afterwards, to wit, the third day of October, 1934 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the tenth day of December, 1934 come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 57] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5545

NANCY K. McFEELY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before Buffington, Woolley and Davis, Circuit Judges

Per CURIAM:

This case depends on its own particular facts and as no precedent or principle is involved and we find ourselves in accord with the action of the Tax Board, we limit ourselves to affirmance of its order.

Endorsements: Opinion Per Curiam. Rec'd & Filed Dec. 10, 1934. Wm. P. Rowland, Clerk.

[fol. 58] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5545

NANCY K. McFEELY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, December 10, 1934.

Per CURIAM:

Buffington, Circuit Judge.

Endorsements: Order Affirming Decree. Rec'd & Filed Dec. 10, 1934. Wm. P. Rowland, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

NO. 5545 OCTOBER TERM, 1934.

NANCY K. McFEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR RE-HEARING.

H. B. WASSELL,
Attorney for Petitioner.

3106 Grant Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

NO. 5545 OCTOBER TERM, 1934.

NANCY K. McFEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR RE-HEARING.

To the Honorable, the Justices of said Court:

Nancy K. McFeely, the petitioner, by H. B. Wassell, Counsel, hereby petitions this Honorable Court for a re-hearing of the above entitled cause and respectfully represents:

(1) Your Honorable Court on December 10, 1934, held:

> "This case depends on its own particular facts and as no precedent or principle is involved and we find ourselves in accord with the action of the Tax Board, we limit ourselves to affirmance of its order."

(2) Counsel for Petitioner, in emphasizing in his oral argument the question of constructive dis-

tribution, raised under the fifth assignment of error, has evidently misled the Court into the conclusion that no precedent or principle was involved.

(3) This case did establish a precedent or principle which was afterwards followed by the Tax Board in other cases. There are appeals now pending in these cases before the Circuit Court of Appeals in four other circuits in addition to this appeal.

(4) The Board of Tax Appeals in this case decided for the first time and as a precedent that the two year period for the purpose of capital gain provisions commences on the date when the property of an estate is distributed and not on the date of its acquisition at decedent's death as decided in *Brewster v. Gage,* 280 U. S. 327.

(5) This principle or precedent was handed down in this case at bar on February 2, 1934, and was followed in the case of *Isabel K. Dibblee v. Helvering,* 29 B. T. A. 1070, on February 13, 1934, Lansdon, J. dissenting, which case is now on appeal in the Ninth Circuit.

(6) The Board of Tax Appeals on February 20, 1934, in a Memorandum Opinion in the case of *Frances G. Lee v. Helvering,* Docket No. 65705, says:

> "The question here presented for our determination is controlled by the Board's decisions in Nancy K. McFeely, 29 B. T. A. 998, promulgated February 2, 1934, and Isabel K. Dibblee, 29 B. T. A. 1070, promulgated February 13, 1934. We held in those cases that the date

of distribution of securities to the legatee or devisee determines the beginning of the period for which they shall be deemed to have been held by such distributee for the purpose of determining the applicability of Section 101 of the Revenue Act of 1928. Upon authority of those cases we hold the securities in question were not held by the petitioner for more than two years within the meaning of Section 101 (c) (8), and that the petitioner is not entitled to report the profits from the sale of the securities in question as capital net gain."

This case is now on appeal to the First Circuit.

(7) The Board of Tax Appeals in Memo. opinion took the same action in the following cases:

Elizabeth R. Stone v. Helvering, now on appeal in the Second Circuit.

Rufus R. Rand, Jr. v. Helvering, now on appeal in the Eighth Circuit.

Kate A. Ogle v. Helvering, now on appeal in the Second Circuit.

(8) The case at bar and the others above cited involve the construction of Section 113, as amended by the Act of 1928, and Section 101, which was not changed, to determine the holding period of "Capital assets," and further involve the question of whether Congress can define property rights contrary to the rules of property existing in the several states.

(9) The principles involved are covered by the Petitioner's assignments of error 1 to 4 and 6,

and were not covered in the oral argument as your Honorable Court seemed to consider the question of constructive distribution of greater importance.

Wherefore in view of the fact that this case is a ruling case establishing a precedent under which appeals are pending in four other Circuit Courts of Appeal, and in consideration of the fact that the principles involved were not fully and adequately presented in the oral argument, Counsel for Petitioner respectfully petitions your Honorable Court to grant a re-hearing, and he will ever pray.

H. B. WASSELL,
Attorney for Petitioner.

3106 Grant Building,
Pittsburgh, Penna.

Certificate.

State of Pennsylvania,
County of Allegheny, } ss.:

H. B. Wassell, being first duly sworn, certifies that he is counsel of record in the above-named cause; that as such he is authorized to verify the foregoing Petition for re-hearing; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief, and that this petition is not filed for the purpose of delay.

H. B. WASSELL.

Sworn to and subscribed before me this 3rd day of January, 1935.

LEO J. AARON,
Notary Public.

[SEAL]

My commission expires March 2, 1937.

[fol. 60] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5545

NANCY K. McFEELY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Sur Petition for Rehearing

And now, to wit, January 18, 1935, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, January 18, 1935.

Per CURIAM:

Buffington, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Rec'd & Filed Jan. 18, 1935. Wm. P. Rowland, Clerk.

[fol. 61] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, sct:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Nancy K. McFeely, Petitioner, vs. Commissioner of Internal Revenue, Respondent, No. 5545, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 26th day of March, in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and fifty-ninth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FIL
APR 16
CHARLES ELMO

IN THE

Supreme Court of the United States

NO. [redacted]24 OCTOBER TERM, 1934

NANCY K. McFEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR WRIT OF CERTIORARI.

NANCY K. McFEELY,

By G. F. SNYDER,
707 Colorado Building,
Washington, D. C.

H. B. WASSELL,
3106 Grant Building,
Pittsburgh, Pa.,

Attorneys for Petitioner.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

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IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM, 1934

NANCY K. McFEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Nancy K. McFeely respectfully represents:

Summary Statement of Matter Involved.

Your petitioner requests this Court to review the judgment of the Circuit Court of Appeals of the Third Circuit entered on December 10, 1934, which for the purpose of the right of appeal became final on January 18, 1935, when the Circuit Court of Appeals entered an order refusing the application of the Petitioner for a Re-hearing.

This case involves a determination as to whether your petitioner is entitled to the benefits of the capital gain provisions of the Revenue Act of 1928, she being a donee of an interest acquired from the widow on August 1, 1925, in the Estate of a decedent who died June 28,

1919, and from the executors of which estate she received on November 3, 1927 personal property, part of her interest, which she sold at a profit on March 14, 1929.

There is no dispute as to the facts in this case and they are fully set forth in the Findings of Fact of the Board of Tax Appeals, (R. 17). The issue can thus be limited to the opposite views of the petitioner and respondent in construing the law as applied to the facts.

The legal question raised is whether the two-year holding period provided by the capital net gain provisions of the Revenue Act of 1928 begins from the date of death of the testator, when title is acquired, or begins from the time of distribution, the base date for determining gain or loss to the residuary distributees.

The pertinent law to determine "capital assets" is found in the Revenue Act of 1928 (R. 25-26).

"Section 101. *Capital net gains and losses*

* * * * * * *

c (8) "Capital Assets" means property held by the taxpayer more than two years. * * * For the purposes of this definition—.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of Section 113, such property has, for the purpose of determining the gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

and the pertinent law to determine gain or loss is found in

"Section 113. Basis for determining gain or loss.

* * * * * * *

(5) Property transmitted at death.

* * * In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

The petitioner sold on March 14, 1929, said stock which she had acquired from the Estate of T. H. Given at a considerable profit, and in filing her Federal income tax return for the year 1929, claimed that the profit on the sale of this stock was capital net gain from the sale of capital assets. The stock was not a specific bequest, but was part of the residuary assets delivered to the petitioner by the executor under order of the Orphans' Court dated November 3, 1927. She had actual possession of the certificates less than two years, but the date of acquisition of her title to them, for the purposes of this case, was the date of decedent's death in 1919.

The respondent, using November 3, 1927, the time of distribution as the basic date for gain or loss, as well as the beginning of the two year capital gain period, determined there was an ordinary profit on the sale in question, holding that the date which governs for gain or loss purposes should be used also for capital gain determination. (R. 13-14). This determination was followed by an assessment for a deficiency of $35,372.53 in petitioner's Federal income tax for the year 1929, which amount was the difference between the tax assessed on ordinary profit and the tax on capital net gain.

The Board of Tax Appeals on February 2, 1934, passed upon the question raised in the case at bar, and for the first time construed Sections 101 and 113 of the

Revenue Act of 1928, as sustaining the contention of respondent that the date of distribution which governs for gain or loss purposes should be used also for capital gain determination. The Board of Tax Appeals followed this construction on February 13, 1934, in the case of *Isabel K. Dibblee v. Helvering,* 29 B. T. A. 1070, and again on February 20, 1934, in an unpublished Memorandum Opinion in the case of *Frances G. Lee v. Helvering,* Docket No. 65705, in which the Board says:

> "The question here presented for our determination is controlled by the Board's decisions in *Nancy K. McFeely,* 29 B. T. A. 998, promulgated February 2, 1934, and *Isabel K. Dibblee,* 29 B. T. A. 1070, promulgated February 13, 1934. We held in those cases that the date of distribution of securities to the legatee or devisee determines the beginning of the period for which they shall be deemed to have been held by such distributee for the purpose of determining the applicability of Section 101 of the Revenue Act of 1928. Upon authority of those cases we hold the securities in question were not held by the petitioner for more than two years within the meaning of Section 101 (c) (8), and that the petitioner is not entitled to report the profits from the sale of the securities in question as capital net gain."

The Board of Tax Appeals later in unpublished Memorandum Opinions took the same action in the following cases:

Elizabeth R Stone v. Helvering, Docket 53902, now on appeal in the Second Circuit.

Rufus R. Rand v. Helvering, Docket 60784, now on appeal in the Eighth Circuit.

Kate A. Ogle v. Helvering, Docket 60785, now on appeal in the Second Circuit.

The Circuit Court of Appeals in different Circuits has both affirmed and reversed the decision and order of the Board of Tax Appeals and Respondent.

In the McFeely case at bar, the Third Circuit on December 10, 1934, affirmed the decision of the Board of Tax Appeals. The Ninth Circuit on February 5, 1935, affirmed the Board of Tax Appeals decision in the case of *Isabel K. Dibblee v. Commissioner*, 29 B. T. A. 1070.

The First Circuit on March 9, 1935, reversed the Board of Tax Appeals in the case of *Frances G. Lee v. Commissioner*, Docket No. 65705, having upon the same day, upon the same question likewise reversed the District Court of Massachusetts in the case of the *First National Bank of Boston, et al., v. United States of America*, 7 F. Supp. 915.

Your petitioner contends that the time of acquisition of title to property is the ruling element in determining "capital assets" and that under the rule laid down in *Brewster v. Gage*, 280 U. S. 327, as to the date of acquisition, the stock sold by her had been acquired and held by her donor from the date of decedent's death, June 28, 1919, until the date of the gift and by petitioner from the time of the gift until the sale on March 14, 1929, a continuous holding period of over nine years, bringing it clearly within the definition of property "held by the taxpayer for more than two years," and therefore the profit thereon is capital net gain and should not be taxed as ordinary net income.

The Circuit Court of Appeals and the Board of Tax Appeals erred when they decided that the acquisition of possession was the controlling element rather than acquisition of property rights; that the stock had not been held for more than two years; that the profit on its sale was ordinary net income, and that it should be

so taxed. The judgment in favor of respondent should be reversed.

Reasons Relied on for the Allowance of the Writ.

I. The Circuit Court of Appeals has decided an important question of Federal Tax law which has not been but should be settled by this Court.

II. If this question is not settled by this Court, profit arising out of the same kind of transactions will be taxed as ordinary net income in the Third and Ninth Circuits and as capital gain in the First Circuit, and the taxes will not be uniform.

III. The Circuit Court of Appeals for the First Circuit has rendered decisions on the same matter which are in direct conflict with this decision of the Third Circuit, and a like decision of the Ninth Circuit.

IV. This decision of the Circuit Court of Appeals is in conflict with the weight of authority and with the applicable decisions of this Court.

Prayer for Writ.

Wherefore your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in the case of *Nancy K. McFeely, Petitioner v. Commissioner of Internal Revenue, Respondent,* No. 5545 October Term, 1934, and that the judgment of said United States Cir-

cuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

NANCY K. MCFEELY,

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Counsel for Petitioner.

BRIEF.

Opinions of Courts Below.

The opinion of the Board of Tax Appeals, (R. 23) is reported in 29 B. T. A. 998. The percuriam opinion of the Circuit Court of Appeals for the Third Circuit (R. 56) is unreported.

Jurisdiction.

1. The judgment of the Circuit Court of Appeals for the Third Circuit was entered on December 10, 1934 (R. 56) and its order denying the petition for re-hearing was entered on January 18, 1935, (R. 64).

2. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936,938.

Statement of the Case.

The facts in this case are not disputed and were stipulated. See (R. 34) and Findings of Fact by U. S. Board of Tax Appeals (R. 16). The facts relevant to the issue raised are as follows:

The petitioner received as donee from her mother, Martha A. Given, as donor, on August 1st, 1925, an absolute assignment of one-tenth of the donor's interest in one-half of the estate of her husband, T. H. Given, which she elected to take against his will and was awarded at the time of his death on June 28, 1919, under the laws of Pennsylvania. The validity of the instruments evidencing the gift was recognized by the Orphans' Court in which the estate of Mr. Given was being administered, and distribution was decreed in accordance therewith.

On November 3, 1927, the Court ordered the distribution to the petitioner, *inter alia,* of 1000 shares of Radio "A" common stock, which were being held by the Executors as part of the residuary Estate.

Petitioner sold said stock on March 19, 1929, at a large profit, and in her 1929 Income Tax Return, she returned this profit as capital net gain and claimed the benefit of the capital gain provisions.

The Respondent determined (R. 13) that there was an ordinary profit on the sale of said stock because under Section 101 (c) (8) of the Revenue Act of 1928, the donor's holding period shall be added to the donee's holding period to determine "capital assets" and under Section 113 (2) property acquired by gift after December 31, 1920, shall take the same basis as in the hands of the donor to determine gain or loss, and it would be inconsistent to hold that the stock sold was in the donor's hands prior to November 3, 1927, the date of the decree of distribution. Therefore, the date which governs for gain or loss purposes should be used also for capital gain determination. Respondent assessed an additional tax against Petitioner for $35,372.53, from which petitioner appealed.

The Board of Tax Appeals sustained Respondents' contention and entered judgment for Respondent.

The Circuit Court of Appeals for the Third Circuit affirmed the order of the Board of Tax Appeals.

Specifications of Error.

FIRST. The Circuit Court of Appeals erred in affirming the judgment of the Board of Tax Appeals.

SECOND. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the first assignment of error, to-wit:

(1) The determination that the profit realized by the Petitioner from the sale of 1000 shares of Radio "A" common stock was "ordinary net income" and not "capital net gain".

THIRD. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the second assignment of error, to-wit :

(2) The determination that capital gain from the sale of capital assets under the requirements of action 101 is reduced to "ordinary net income" because the basis of determining the gain as prescribed in Section 113 (a) (5) sets a date over two years after the date of actual acquisition of the capital assets.

FOURTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the third assignment of error, to-wit:

(3) The determination that the date which governs for gain or loss purposes in Section 113 (a) (5) of the Revenue Act of 1928 must be used in fixing the date of acquisition for capital gain determination under Section 101 (8) of said Act, thereby voiding any previous holding period.

FIFTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the fourth assignment of error, to-wit:

(4) The determination that the petitioner's basis for "capital gain or loss" in the sales in question was limited, reduced and restricted by Section 113 (a) (5) of the Revenue Act of 1928, and that November 3, 1927, is the date which governs the determination of capital net gain or loss.

SIXTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the eighth assignment of error, to-wit:

(8) The finding of the deficiency for the year 1929 of $35,372.53, in lieu of a determination that there was no additional income tax due from the petitioner for the year in controversy.

Argument.

I. THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL TAX LAW WHICH HAS NOT BEEN BUT WHICH SHOULD BE SETTLED BY THIS COURT.

Under this decision all the inherited personal property throughout the country, except specific bequests, is limited to the date of its distribution for determining the holding period for capital gain purposes if sold prior to the passage of the Revenue Act of 1934. Many taxpayers will be deprived of the capital gain provisions. It is of the utmost importance to many legatees and beneficiaries throughout the United States that a final decision be handed down.

We have been unable to find any case in which this Court has passed upon a similar question. The Board of Tax Appeals in its Memo Opinion in the case of *Lee v. Helvering*, Docket No. 65705, (unreported) (R. 60) indicates that it first passed upon the question in this McFeely case at bar.

There are not less than three other cases raising the same issue now pending in the Second and Eighth Circuits of the Circuit Court of Appeals.

II. UNIFORMITY OF TAXES IN QUESTION.

In view of the different decisions in the First, Third and Ninth Circuits, citizens of various circuits will be subject to a different tax rate on profit from the sale of property held under the same set of circumstances. Capital gain in the First Circuit will be ordinary net income in the Third and Ninth Circuits and the tax must be imposed at different rates unless the question is settled by this Court and a uniform tax thereby established.

III. THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT HAS RENDERED DECISIONS ON THE SAME MATTER WHICH ARE IN DIRECT CONFLICT WITH THIS DECISION OF THE THIRD CIRCUIT AND A LIKE DECISION OF THE NINTH CIRUIT.

In the case of *Frances G. Lee v. Commissioner of Internal Revenue* (.... F (2nd) ....) C. C. H. '35 Vol. 3, Par. 9215, which was decided by the Board of Tax Appeals upon authority of the McFeely case at bar (R. 60) the Circuit Court of Appeals for the First Circuit says, in reversing Board of Tax Appeals unpublished Memorandum Opinion:

> "WILSON, J.: This is a petition for review of a decision of the Board of Tax Appeals. The main issue is the same as that involved in the case of *First National Bank of Boston et al. v. United States,* decided by this court on March 9, 1935. There was a sale of securities by a residuary legatee in 1929, more than two years after the death of

the testator, but less than two years from the date of distribution. The Commissioner assessed the gain in accordance with Sec. 113 (a) (5) of the Revenue Act of 1928, but held it was not a capital gain, which was affirmed by the Board of Tax Appeals. Since the acquisition of the securities sold dates back to the death of the testator, *Brewster v. Gage,* 280 U. S. 327; *Chandler v. Field,* 63 Fed. (2d) 13, 15; certiorari denied, 289 U. S. 758; *Walker v. Hill,* 73 N. H. 254; *Sanborn v. Clough,* 64 N. H. 315, they were held more than two years and should be treated in assessing the tax as a capital gain, although the amount of the gain was properly determined under Sec. 113 (a) (5). See *First National Bank of Boston et al. v. United States, supra.*"

In the case of *First National Bank of Boston, et al., v. United States of America,* (... F. (2d) ....), C. C. H. '35, Vol. 3, Par. 9214, referred to in *Lee v. Commissioner, supra,* and reversing a like decision in the District Court (7 F. Supp. 915), the Court says:

"Edward E. Blodgett died April 4, 1926. By his will he bequeathed to the petitioners as trustees the residuum of his estate consisting, in part, at least, of securities. Sometime after April 4, 1928, and more than two years after the testator's death, but less than two years after they were turned over to the trustees by the executor of the will, some of the securities were sold by the trustees at a gain of $74,773.08 over their value at the time of distribution, which value, under Sec. 113 (a) (5) of the Revenue Act of 1928, was the basis for determining gain or loss in case of residuary bequests.

The petitioners contend that under the rule laid down in *Brewster v. Gage,* 280 U. S. 327, as to the date of acquisition, and according to the laws of

Massachusetts, the securities had been held by the trustees for more than two years and the gain was, therefore, a capital gain and should have been taxed as such under Sec. 101 (a) of the Act of 1928. The government, however, contends that Congress has a right to determine what shall be considered capital assets and the basis for determining gains and losses; and that, inasmuch as the basis for determining the gain or loss in case of a sale of personal property acquired under a residuary bequest is fixed in Sec. 113 (a) (5) of the same Act as the value at the time of distribution, Congress must have intended that in such case the date from which the two year period is to be computed is also the date of distribution. The government also contends, since the provisions of Sec. 101 (c) (8) B provide that, in determining the period during which a taxpayer has held property, there shall also be included the period for which such property has been held by any other person, provided that under the provisions of Sec. 113 such property has for the purpose of determining gain or loss the same basis, in whole or in part, in the hands of the taxpayer as it would have had in the hands of such other person, that the period during which these securities were held by the executor cannot be added to the time in which they were held by the trustees; since the basis for computing the gain, if sold by an executor, is the value at death of the testator, while in the case of the residuary legatee it is the date of distribution.

It should be noted, however, that the reference in Sec. 101 (C) (8) B is not alone to para. (a) (5) of Sec. 113, but to the entire section, which contains other instances of the arbitrary fixing of the base value for determining gains and losses. This con-

tention of the government is evidently based on the theory that a legatee acquires title from the executor; but since a legatee, whether special or residuary, does not acquire his title from the executor, but under the will, *Brewster v. Gage, supra; Chandler v. Field,* 63 Fed. (2d) 13, 15, certiorari denied, 289 U. S. 758; *Davis v. Newton,* 6 Met. 537, 541; *Hooper et al. v. Bradford,* 178 Mass. 95, 97, Sec. 101 (c) (8) B has no application to this case. Personal property transmitted at death is not held by the representatives of the estate within the meaning of Sec. 101 (c) (8) B. The executor or administrator can only be said to hold it for the limited purpose of administration, or, as has been said, in *autre droit,* or as a quasi trustee for the benefit of the legatees, or heirs. *Lathrop v. Merrill,* 207 Mass. 6, 10.

In *Brewster v. Gage, supra,* the court said, p. 334:

> 'Immediately upon the death of the owner there vests in each of them (referring to a legatee or heir) the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution * * * Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to

them. The legal title so given relates back to the date of the death.'

It is clear that acquisition as used in these Acts means acquisition of title and not of possession.

As the Committee on Ways and Means pointed out in its report to the House No. 704 on the Revenue Act of 1934, with respect to the change in Sec. 113 (a) (5) of the pending bill from that of the Act of 1928:

> 'The change in the 1928 Act was made because there was some doubt as to the meaning of the term "acquisition," which was the term used in the Act of 1926. Since the 1928 Act was passed, the Supreme Court has defined the "date of acquisition" to mean the date of death in the case of all property passing by bequest, devise or inheritance, whether real or personal. (*Brewster v. Gage,* 280 U. S. 327.) Sec. 113 (a) (5) of the bill conforms to the language contained in the Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal.'

In the 1921 Act, Sec. 206 (a) (6), it was provided that to constitute capital assets, property must be 'acquired and held' for two years. In subsequent Acts the word 'acquired' has been omitted, the obvious reason is that the word 'acquired' was surplusage, since, in general, property is held from the time it is acquired or one's ownership begins.

A comparison of corresponding sections in prior Acts: Secs. 206 (a) (6), and 202 (a) (3) of the 1921 Act; Secs. 208 (a) (8) and 204 (a) (5) of the 1924 Act; Secs. 208 (a) (8) and 204 (a) (5)

of the 1926 Act, discloses that capital assets are determined by the time property is 'held,' while gains and losses are computed from the value as a base at the time of acquisition, except in certain instances of an arbitrary fixing of the base value. It was not until the insertion of Sec. 113 (a) (5) in the 1928 Act that any change was made in the base for computing gains between personal property transmitted at death by special bequest and by residuary bequests.

It is significant, however, that even in para. (a) (5) of Sec. 113 of the 1928 Act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides that, 'If personal property is acquired by specific bequest,' etc., and 'in all other cases, if the property was *acquired either by will or intestacy.*' (Italics supplied.)

Sec. 101 and Sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.

In other words, Congress intended only by the change in Sec. 113 (a) (5) of the 1928 Act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the Administrative Bureau as to date of acquisition of such property. It, however, made no substantial

change in Sec. 101 of that Act from the provisions of Sec. 208 (a) (8) of the 1926 Act for determining what are capital assets.

In view of the purpose, which has repeatedly been recognized both by the Administrative Bureau and the courts of allowing a gain from the sale of property held for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the Revenue Acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the government in construing Sec. 113 (a) (5) of the 1928 Act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for computing gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by Sec. 113 (a) (5) of the Act of 1928 to effect a change in the period during which the property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in Sec. 101 of that Act.

There is nothing new in fixing an arbitrary date for determining the base value for computing gain or loss in the sale of property and different from that when the property was acquired by the taxpayer. In case of property purchased prior to 1913, it was fixed as of March 1, 1913, unless the cost price was in excess of their value on that date; also

see Sec. 208 (a) (8) of the 1926 Act, and see Sec. 113 (a) (1) (2) (3) (4) (6) of the 1928 Act.

We find nothing in the decisions in *Helvering v. New York Trust Co.*, 292 U. S. 455, or *Helvering v. Bliss*, 293 U. S. 144, which modifies the rule laid down by the Supreme Court in *Brewster v. Gage, supra*, in construing the sections of the earlier Acts corresponding to Sec. 113 (a) (5). Under the rule laid down in *Brewster v. Gage, supra*, we think the petitioners acquired the corpus of the trust on April 4, 1926, and therefore held it more than two years prior to the sale, and that the District Court erred in holding that under the provisions of Sec. 101 (c) (8) B of the 1928 Act, the taxpayer had not held the securities sold since the death of the testator.

The gain of $74,773.08 resulting from the sale of securities by the trustees, therefore, should have been treated as a capital gain, and in order to determine the total amount to which the petitioners are entitled as a refund, the case must be remanded for a recomputation of the tax in accordance with this opinion.

The judgment of the District Court is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion."

In direct conflict with the two decisions *supra*, and in addition to the case at bar, is the case of *Isabel K. Dibblee v. Commissioner of Internal Revenue*, in which the Ninth Circuit of the Circuit Court of Appeals affirms the Board of Tax Appeals decision 29 B. T. A. 1070, and in its opinion not yet reported (.. F. (2) ..) (C. C. H. '35, Vol. 3, Par. 9128), says:

"The controversy arises from an application and interpretation of the provisions of Section 101

and Section 113 (a) (5), which definitely establish both the method of determining the period of holding and the basis for the determination of the taxpayer's gain. They are to be read together and, when done so, on all personal property acquired by specific bequest the basis shall be the fair market value of the property at the time of the death of the decedent, and if the property be acquired either by will or by intestacy the basis shall be the fair market value of it at the time of distribution to the taxpayer. Capital assets, as defined by Section 101 (c) (8) of the Revenue Act means 'property held by the taxpayer for more than two years.' Petitioner asserts that under these provisions of the act the profit resulting from the sale of the securities was 'capital gain' and, consequently, taxable as such, and not as 'ordinary income,' and if correct there would be no deficiency.

The securities upon which petitioner realized a profit of $28,441.86 were the property of decedent at the time of her death, which was more than two years before the date of sale, and were acquired by petitioner as a general bequest of personal property by will, and would seem to be governed by the provision in Section 113 (a) (5) of the act, that

> 'In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.'

But it is argued by petitioner that the laws of California determine the date from which the taxpayer 'held' the securities in question, as under the laws of that State the legal title to property transmitted by will or intestacy vests immediately upon

the decedent's death in the devisee, legatee or heir, as the case may be. We cannot agree with the correctness of the contention, for the Federal statute determines the time the taxpayer 'acquired' personal property, when acquired as a general bequest by will, to be at the time of the distribution to the taxpayer, and not at the time of decedent's death. Therefore, the taxpayer is considered as 'holding' the securities only from the time of distribution. The purposes or effect of the revenue laws of the United States cannot be contravened by state law. *Burk-Waggoner Assn. v. Hopkins,* 269 U. S. 110; *Weiss v. Wiener,* 279 U. S. 333; *Corliss v. Bowers,* 281 U. S. 376, 378.

The decision of the Board of Tax Appeals is affirmed."

In the case of McFeely v. Commissioner at bar the Third Circuit affirmed the Board of Tax Appeals decision which is in direct conflict with the decisions of the First Circuit.

See opinion of Board of Tax Appeals (R. 23).

From the above decisions it is plainly apparent that the Circuit Courts of different Circuits have decided the same question in opposite ways, and that it will require a decision of this Court to finally settle the issue in this case and all the other cases in which appeals are now pending, as well as the cases not yet passed upon by the Commissioner of Internal Revenue.

IV. THIS DECISION OF THE CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE WEIGHT OF AUTHORITY AND WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Board of Tax Appeals and the Third and Ninth Circuit Courts in affirming them have taken the narrow untenable position that in decedents' estates no property right existed which could be interpreted as "being held" by the distributee until reduced to possession by distribution. In both cases they decided the distributees had not held the assets within the meaning of Section 101 for a period of two years before they were sold and that the two year period commenced to run from the date of distribution, when the petitioners actually acquired physical possession of the personal property.

This is in direct conflict with the decision in *Brewster v. Gage*, 280 U. S. 327, in which this Court says:

> "The decree of distribution confers no new right, it merely identifies the property remaining, evidences right of possession in the heirs or legatees, and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of death."

The Supreme Court thus sustained one of the rules of property which exists in most of the States that title to property passing by bequest, devise or inheritance is acquired at the date of decedent's death.

The Ninth Circuit Court, however, in *Dibblee v. Commissioner, supra*, says:

> "We cannot agree with the correctness of this contention (that the legal title to such property vests upon decedent's death as held in *Brewster v. Gage, supra*) for the Federal statute determines the time the taxpayer 'acquired' personal property,

when acquired as a general bequest by will, to be at the time of distribution to the taxpayer, and not at the time of decedent's death."

This interpretation of Sections 101 and 113 can only be from a strained inference and not from the actual wording of the provisions "capital assets means property held more than two years", and "if the property was acquired either by will or intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer". It cannot be supported by giving the words used in these provisions their usual and ordinary meaning and this is the meaning required to be given statutes in their interpretation by the Supreme Court as decided in *DeGanay v. Lederer*, 250 U. S. 376, in which the Court said at page 381:

> "Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and within the meaning commonly attributable to them."

The word "held" as used in regard to property, as in Section 101 (c) (8), means "owned" or "having title to" and property "owned" by a taxpayer is property "held" by the taxpayer. The word "acquire" means "to get or gain", "to get as one's own", or "to get as one's own, as to acquire a title". These meanings appear in the standard dictionaries without qualification.

Thus it would appear that the Ninth Circuit Court has placed an unusual, limited and restricted meaning on the words "held" and "acquired" in the statute in determining that under Sections 101 and 113 personal property acquired as a general bequest by will, is not acquired at decedent's death but is acquired at time of distribution, and to decide therefore that the taxpayer

is considered as "holding" the securities only from the time of distribution.

The Ninth Circuit Court dismisses these decisions of the Courts concerning the property of estates of decedents by citing certain cases to show that the purposes and effect of the revenue laws of the United States cannot be contravened by state law.

In *Burk-Waggoner Association v. Hopkins*, 269 U. S. 110, cited, the Supreme Court decided Congress could determine how and at what rate the income of a joint enterprise shall be taxed regardless of the state laws governing the creation and operation of such joint enterprise..

In *Weis v. Wiener*, 279 U. S. 333, cited, the Supreme Court decided a lessee of realty under 99 year leases was not entitled to deduction in his income tax for estimated obsolescence for which he had not paid.

In *Corliss v. Bowers*, 281 U. S. 376, cited, the Supreme Court decided that a grantor of a revocable trust could be taxed on the income therefrom.

In citing these cases the Circuit Court failed to recognize that the issues therein raised and determined were not concerning the basic rules of property and that as the Court said in *Harmel v. Commissioner*, 56 F. (2d) 153, "It is no new doctrine that a rule of property prevailing in a state, and changes in that rule, will be recognized in administering the federal income tax law. *United States v. Robbins*, 269 U. S. 315."

And further as said in *Johnson v. Commissioner*, 56 F. (2d) 58, "State laws do not control federal taxing statutes unless creating a rule of property."

The Third Circuit Court in the McFeely case at bar limited themselves in their *per curiam* opinion to affirming the order of the Tax Board without discussion (R. 56).

The Board of Tax Appeals, however, recognized the rule of property as set up in *Brewster v. Gage*, 280 U. S. 327, saying in the opinion (R. 27):

> "The widow, on July 3, 1919, elected to take against the will of her deceased husband, one-half of the estate in lieu of her dower under the laws of Pennsylvania. By virtue of such election one-half of the estate of her deceased husband vested in her immediately and absolutely. *Re Greiner's Appeal*, 103 Pa. 89.",

but they immediately fell into error by drawing a distinction between the equitable title and actual possession in defining the holding period for capital assets, saying in their opinion (R. 28-29):

> "She sold shares of stock which were distributed to her by the executors of the Estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the executors of the estate and not in the petitioner. In view of these facts we think that it cannot be said that the petitioner held them for a period of two years at the date of sale."

Thus, although the time of acquisition of title as defined under the state laws was originally made the ruling element in determining "capital assets", and remains the ruling element in all other cases, the Board has placed an unusual and restricted meaning on the words in the statute, in so far as residuary property of a decedent is concerned, and decided that this property is not acquired or held until physical possession is de-

livered at the time of distribution for the purpose of determining whether or not it is a "capital asset".

Physical control and possession has never been considered an essential element in the definition of the word "held" as used in the Capital Gain Section 101 except in the case at bar. The Respondent and the Board of Tax Appeals have not held possession, dominion and control for two years to be requisite in stock dividends, stock subscription rights, stock purchased on margin, interests in stock exchange memberships issued to old members, agreements to purchase stock, and agreements to purchase real estate where the original source of title was acquired more than two years before sale.

Thus singling out residuary estates respondent and the Board of Tax Appeals attempt to amend the capital gain provisions of the Act of 1928, Section 101, by reading into it "capital assets means property *the physical possession, dominion and control of which has been* held for more than two years," because the basis of gain or loss in Section 113 has been changed in the 1928 Act to date of distribution, and it would be inconsistent to have two dates for these two different purposes.

This construction is without precedent and unwarranted and results in an absurd and unjust penalty to petitioner. If she had sold the stock in question on December 31, 1927, she would have been entitled to the capital gain rate on her profit, because *Brewster v. Gage supra*, established that the property was acquired at the date of decedent's death and she and her donor would have held it more than two years, but if she sold on a day later, January 1st, 1928, she is deprived of the capital gain rate and must pay the ordinary net income rate because the Court decides she holds it from date

of distribution, notwithstanding the fact that, although the gain and loss section was charged, the capital gains section was re-enacted in the Revenue Act of 1928 without change. The penalty is imposed by an interpretation and not by an actual amendment.

We respectfully submit that the Board of Tax Appeals has not offered any legal basis to support this radical determination.

In direct contrast the First Circuit Court in its opinions in *The First National Bank of Boston et al. v. United States of America, supra,* and in *Frances G. Lee v. Commissioner, supra,* has discussed at considerable length the capital gain and gain and loss sections of the Revenue Acts from 1921 to 1928 and their application to the questions involved in following out the principles determined in *Brewster v. Gage, supra.*

We endorse the sound reasoning of the First Circuit Court that under authority of *Brewster v. Gage, supra,* the legatee or distributee does not acquire his title from the executor or administrator, but under the will or under the intestate laws, and title vests as of the date of decedent's death; that acquisition as used in these Acts means acquisition of title and not of possession; that Sections 101 and 113 were enacted for entirely different purposes, the first defining capital assets and capital gains, and the second defining the method of determining the amount of the gains, whether capital gains or ordinary net income, and that these sections are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer; that since the acquisition of the securities sold dates back to the death of decedent they were held more than two years and should be so treated in assess-

ing the tax as a capital gain although the amount of the gain was properly determined under Section 113 (a) (5).

Nothing has been said by the Ninth Circuit Court or the Board of Tax Appeals which can be used to refute the sound reasoning and conclusions of the First Circuit Court and we submit it is plainly evident that the decision of the Third Circuit Court of Appeals in the case at bar is against the weight of authority and in conflict with the applicable decisions of other Circuit Courts and of the Supreme Court of the United States.

Conclusion.

We submit that the weight of authority supports our specifications that the Circuit Court of Appeals for the Third Circuit erred in affirming the Board of Tax Appeals' decision that the date which governs for gain or loss purposes must be used in fixing the date of acquisition for capital gain determination; that petitioner had not held the stock sold for more than two years from the date of distribution; that the stock was therefore not a capital asset and that the profit realized by her from the sale thereof was "ordinary net income", and the said Court further erred in affirming the decision that the petitioner was therefore liable for an additional income tax of $35,312.53 for the year 1929.

In view of the fact that this is an important question of federal tax law which has not been decided by this Court, and which petitioner contends has been decided in error against the weight of authority and in conflict with applicable decisions of this and other Courts, and in view of the conflicting opinions of the

Circuit Courts on the identical question, we submit that this case should be reviewed and the question at issue finally settled by your Honorable Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 24

NANCY K. McFEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

NO. 24 OCTOBER TERM, 1935

NANCY K. McKEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

BRIEF FOR PETITIONER.

OPINIONS OF COURTS BELOW.

The opinion of the Board of Tax Appeals, (R. 23) is reported in 29 B. T. A. 998. The *per curiam* opinion of the Circuit Court of Appeals for the Third Circuit, (R. 56) is reported in 74 F. (2d) 1017 (C.C.A. 3).

STATEMENT OF THE CASE.

This is a petition by Nancy K. McFeely, a resident of Latrobe, Pennsylvania, hereinafter referred to as the petitioner, for review of the decision of the Circuit Court of Appeals for the Third Circuit (R. 57) affirming the judgment of the Board of Tax Appeals (R. 28-29), that the profit realized by the petitioner from the sale of 1000 shares of Radio A common stock on March 14, 1929, was ordinary net profit instead of capital net gain and that there was a deficiency of $35,372.53 in her income tax for 1929.

The facts are set forth in full under the Stipulation (R. 34) and in the opinion of the Board of Tax Appeals (R. 16).

The petitioner was the owner of the 1000 shares of Radio A common stock which she acquired as a gift from her mother, Martha A. Given. The stock had been a part of the estate of Mrs. Given's husband prior to his death.

T. H. Given died in 1919, and no provision having been made in his will for his wife, Martha A. Given, she elected to take one-half of his estate, pursuant to the law of Pennsylvania, in lieu of dower.

In 1924, Mrs. Given made a written assignment in trust for the petitioner of ten per cent. of her undistributed one-half interest in her husband's estate and in 1925 this gift was made absolute. The gift was reported and a gift tax of $2,417.90 was paid thereon. (R. 35).

In 1925 the Executors of T. H. Given filed a second and partial account and a sworn statement at the audit that all creditors had been paid; that all the parties in interest had elected to take in kind the stocks, bonds and cash to be distributed and that they had agreed that a portion of the securities and cash should be held by the Executors and distribution suspended (R. 35-36). Certain stocks were distributed under a decree at this audit which are not material to this issue.

On November 3, 1927, pursuant to a further decree of distribution the petitioner received from the Executors among other assets certificates for 1000 shares of Radio A common stock.

On March 14, 1929, she sold the Radio stock for $484,460.00. This stock had been valued for gift tax purposes as of June 23, 1924, at $20,625.00.

In March, 1930, petitioner filed her 1929 Income Tax Report claiming and reporting $394,685.00 as capital net gain, including, *inter alia*, the profit on the sale of

the Radio A common stock, upon which she paid a capital gain tax of $49,335.63 (R. 37).

The Commissioner of Internal Revenue determined that there was an ordinary profit of $404,085. on the sale of 1000 shares of Radio A common stock, instead of a capital net gain, upon the theory that the Radio stock sold was not property acquired by the petitioner until delivery on November 3, 1927, by the executors, because the date which governs for gain or loss purposes under Section 113 (a) (2) for her donor must be used as the date for determining what constitues "capital assets" and "capital net gain" under Sec. 101 (c) (8) (B) for the donee, and it would be inconsistent to hold that the stock was in the donor's hands prior to November 3, 1927. Therefore, since the stock was sold on March 14, 1929, not having been held by the petitioner nor her donor for a period of two years from November 3, 1927, the profit could not be considered capital net gain but would be subject to both normal tax and surtax (R. 13-14).

The Commissioner in his letter of final determination of petitioner's tax liability for the year 1929, found a deficiency of $35,372.53 (R. 9).

The petitioner appealed from this determination in a petition filed with the Board of Tax Appeals on January 24, 1933 (R. 2).

The Board of Tax Appeals on February 6, 1934, in its opinion filed (R. 56) sustained the Commissioner's determination and ordered and decided that there was a deficiency of $35,372.53 for the year 1929, and entered judgment for respondent.

The petitioner on April 23, 1934, filed her petition for review by the Circuit Court of Appeals for the Third Circuit (R. 30), which court on December 10, 1934, in a *per curiam* opinion (R. 56) also sustained respondent's

determination and affirmed the judgment of the Board of Tax Appeals.

The petition for certiorari was filed April 16, 1935 in this Court and certiorari granted May 20, 1935.

From this decision the petitioner requests this Honorable Court to review the Record and the proceedings to the end that the judgment may be reversed and that your petitioner may have such other and further relief as may seem meet and just.

SPECIFICATION OF ERRORS TO BE URGED.

FIRST. The Circuit Court of Appeals erred in affirming the judgment of the Board of Tax Appeals.

SECOND. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the first assignment of error, to-wit:

> (1) The determination that the profit realized by the Petitioner from the sale of 1000 shares of Radio "A" common stock was "ordinary net income" and not "capital net gain."

THIRD. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the second assignment of error, to-wit:

> (2) The determination that capital gain from the sale of capital assets under the requirements of Section 101 is reduced to "ordinary net income" because the basis of determining the gain as prescribed in Section 113 (a) (5) sets a date over two years after the date of actual acquisition of the capital assets.

FOURTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the third assignment of error, to-wit:

(3) The determination that the date which governs for gain or loss purposes in Section 113 (a) (5) of the Revenue Act of 1928 must be used in fixing the date of acquisition for capital gain determination under Section 101 (8) of said Act, thereby voiding any previous holding period.

FIFTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the fourth assignment of error, to-wit:

(4) The determination that the petitioner's basis for "capital gain or loss" in the sales in question was limited, reduced and restricted by Section 113 (a) (5) of the Revenue Act of 1928, and that November 3, 1927, is the date which governs the determination of capital net gain or loss.

SIXTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the eighth assignment of error, to-wit:

(8) The finding of the deficiency for the year 1929 of $35,372.53, in lieu of a determination that there was no additional income tax due from the petitioner for the year in controversy.

SUMMARY OF ARGUMENT.

Property held for more than two years from the time it is acquired under the laws prevailing in the state in which the taxpayer resides qualifies as "capital assets," as defined in Section 101 of the Revenue Act of 1928.

The two year tenure begins at the time of acquisition of title, even though the property is not reduced to physical possession.

In the 1921 Act, Section 206 (a) (6), it was provided that to constitute capital assets property must be acquired and held for two years. In subsequent acts the word "acquired" has been omitted, the obvious reason is that the word "acquired" was surplusage, since in general, property is held from the time it is acquired or one's ownership begins. (*First National Bank of Boston v. United States,* 76 Fed. 200.) p. 18.

The provisions of the 1926 Act were reenacted as Sections 101 and 168 in the 1928 Act and no change has been made in the meaning of the definition of "capital assets" since the 1921 Act.

The Commissioner, the Board of Tax Appeals and the Circuit Court of Appeals have repeatedly decided in cases arising prior to the Act of 1928 that the two year period begins to run from the date of taxpayer's acquisition of the property and this is the first case under the 1928 Act, or any other act, in which the Commissioner has decided that the two year period starts from the date of possession and not from the time of acquisition of title.

Section 113 of the Revenue Act of 1928 changed the basis for gain or loss on certain property acquired by will or intestacy to time of distribution.

Respondent, on account of this change in the basis for gain or loss, held that while certain stock certificates

were in the hands of the executors they were not in any proper sense "held" by the petitioner, and therefore, she could not be said to have held them as "capital assets" under Section 101 for a period of more than two years from the time of distribution when sold. Respondent thus in interpreting this change contends that Section 101 was inferentially changed and that Congress intended to provide that when certain property is acquired by will or intestacy it is acquired at time of distribution, instead of at date of death as uniformly held by the laws of the States.

Congress cannot legally define time of acquisition contrary to laws prevailing in the States. Physical possession has never been considered an essential element for capital gain determination.

Under the laws of Pennsylvania, the property in controversy vested in the donor at the death of her husband in 1919, and vested in the petitioner as donee not later than 1925, subject to the payment of his debts and administration expenses, which were paid prior to the date of distribution in 1925. Delivery of the particular certificates was postponed until a later decree of distribution on November 3, 1927. No new right was acquired by delivery and legal title relates back to the date of death in the hands of the donor and to the date of the gift in the hands of the petitioner as donee. (*Brewster v. Gage,* 280 U. S. 327.) The property was held by the taxpayer for more than two years from time of acquisition.

The petitioner sold the stock on March 14, 1929, almost ten years after the date of death and over four years from the date of gift at a profit which qualifies as capital gain under the provisions of Section 101, the amount of her gain to be computed under the changed basis for gain or loss, as set up in Section 113.

STATEMENT OF QUESTIONS INVOLVED.

First. Under the Revenue Act of 1928, in determining capital gain on property sold by a general beneficiary of an estate, does the holding period begin when acquired at decedent's death or when reduced to possession at the time of distribution?

Second. Is a donee, who has held gift property for more than two years from the date of gift, deprived of her capital gain privilege upon its sale because the gain and loss provisions of the Revenue Act of 1928 establish her basis for gain or loss at a date after the gift and less than two years from the date of sale?

Petitioner's Contention.

Petitioner contends that she acquired the property in question by gift from her widowed mother; that the right to delivery by distribution in the course of administration was incidental to the property acquired by gift; and that the property sold was property held by her for more than two years from the time of gift, and therefore her profit was capital gain.

Respondent's Contention.

Respondent contends that petitioner's holding period of over two years from the date of gift to time of distribution could not be recognized for capital gain purposes, because under the Revenue Act of 1928 her basis for gain or loss as donee was the same as that of her mother as donor; that this basis was the time of distribution; that neither petitioner nor her mother could be said to hold the property sold before the time of distribution; that this date was less than two years from the date of sale; therefore her profit on the sale was not capital gain.

ARGUMENT.

PROPERTY DEFINED.

We have first to determine whether petitioner held property within the meaning of the Revenue Act of 1928. This Act does not define property and does not limit the term in any way. It must, therefore, be considered to be used in its general sense and as construed by the law of the State.

The term property is employed to signify any valuable right or interest protected by law and the subject matter or things in which rights or interests exist. *50 C. J.* 729.

In *Buchanan v. Worley,* 245 U. S. 60, Mr. Justice Day said (P. 74):

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. * * * Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or domination save by the law of the land. *1 Blackstone Commentaries* (Cooley's Ed.) 127.

To acquire means to obtain, to get as one's own, to get or gain by some lawful title. In its primary sense to get as owner. In its broader sense to obtain in any manner, to gain by any means. Thus the word includes to take by descent or distribution, by purchase or under a will. *1 C. J.* 908.

As equitable interests can be acquired, used and disposed of, they are property to the same extent as any other acquisition and become one's property as soon as acquired.

The power to make laws governing acquisition and disposition of property is vested in the States. The State laws determine what is property, determine when it is acquired, regulate its use, provide for its transfer by sale or gift by the living or by bequest, devise or intestacy at death.

Rules of property prevailing in the States must be recognized for Federal income tax purposes. *Harmel v. Commissioner* 56 F. (2) 153; *Johnson v. Commissioner* 56 F. (2) 58.

Under the broad powers of the Sixteenth Amendment, Congress has been authorized by law to lay and collect taxes on incomes from whatever source derived, and can define what is income from property and what part of the income shall be taxed, but it has no power to define the elementary rules of property contrary to the rules existing in the States.

THE PROPERTY AS CONSTRUED BY PENNSYLVANIA LAW.

The property in question was a part of the Estate of T. H. Given, of Pittsburgh, Pennsylvania, at the time of his death on June 28, 1919. It became a part of the interest of his widow, who elected at his death to take one-half of his estate against his will under the statutes of Pennsylvania.

In *Greiner's Appeal,* 103 Pa. 89, it is held that the election which she made vested in her immediately and absolutely one-half of the estate of the decedent, which

remained after payment of his debts and expenses of administration.

It is well settled in Pennsylvania that executors and administrators are trustees for creditors and beneficiaries and that all the property of the decedent vests at the time of death of decedent, subject to the payment of debts and expenses of administration.

In *Abbott's Executor v. Reeves, et al.*, 49 Pa. 494, Read, J. says (p. 505):

> "In Pennsylvania an executor is emphatically a trustee having no other interest than in his commissions and what may be directly given to him by the testator. All funds of the estate in his hands are trust funds, and if loaned by him to others with knowledge of the facts, are trust funds in the hands of the receiver, and, whether loaned properly or not must be repaid to the trustee."

In *Walworth v. Abel*, 52 Pa. 370, it is held that the mere legal estate of a decedent passes to the administrator, but if there be no creditors, the heirs have a complete equity in the property and may distribute it among themselves without administration.

In *Roberts v. Messinger*, 134 Pa. 298, Mr. Justice Sterrett says (p. 309):

> "While it is true that administration is the legally appointed channel through which an absolute title to personal property of an intestate is acquired, it is equally true that property of such intestate passes at his death to those legally entitled to the succession, subject to the claims of creditors and the laws in force for administering it.

In *Hood v. Maires,* 255 Pa. 128, Mr. Justice Walling says (p. 132):

> "The law favors vested rather than contingent estates and unless it clearly appears from the context or circumstances of the case that a contingent interest was intended, the remainder will be regarded as vesting at the death of the testator and not at the expiration of the life tenancy: *Bache's Estate* 246 Pa. 276; *Tatham's Est.* 250 Pa. 269.

In *Jenning's Estate,* 266 Pa. 60, in a *per curiam* opinion, the Court says (p. 62):

> "The daughter, Catherine, was *in esse* at her father's death; he fixed her mother's death as the time when she was to come into possession of her share in his estate; the bequest was not qualified, but absolute; no precedent condition was attached to it, and the time fixed for the enjoyment of it was not expressly or by implication annexed to the gift. The interest clearly vested at testator's death: *Carstensen's Est.* 196 Pa. 325; *Bair's Est.* 255 Pa. 169; *McCauley's Est.* 257 Pa. 377."

THE PROPERTY CONVERTED INTO A GIFT TO PETITIONER.

The widow had vested property rights to sell or give away, as in Pennsylvania not only vested interests but contingent interests may be sold. This is established in *Whelen v. Phillips,* 151 Pa. 312, in which case Mr. Justice Paxson says (p. 322):

> "But without inquiring as to the present status of the law elsewhere, it may be confidently asserted that a person, *sui juris,* owning a contingent remainder in land, or in personal property, may sell the same for such sum as may be agreed upon between himself and the purchaser, provided the

former does not stand towards him in a trust relation, and, in making the purchase, acts in good faith."

This is followed in *Long's Est.* 228 Pa. 594, and *Richardson's Est.* 236 Pa. 136.

Having acquired in 1919 the interest which vested in her at her husband's death, the widow in 1924 made a valid assignment in trust to the petitioner of ten per cent thereof, and in 1925 this gift was made absolute. The gift was assessed and a gift tax was paid thereon in 1925. The property evidenced by the gift vested in the petitioner by the assignment in 1924. The respondent assessed it at such a substantial amount that the gift tax thereon amounted to $2,417.90 (R. 35) and under the laws of Pennsylvania, the petitioner acquired the property and held it from that time.

As an incident to the vested right, she received the right to delivery of the shares of stock in controversy from the executors. These were delivered under Decree of Distribution dated November 3, 1927, less than two years from date of sale.

Petitioner sold the stock which was a part of the gift on March 14, 1929, almost five years from the original date of the gift and almost ten years from decedent's death. She realized considerable profit which she returned as capital gain.

POWER OF CONGRESS TO FIX THE BASIS OF GAIN OR LOSS.

Congress is not limited in fixing the basis of gain or loss so long as the basis is uniform. The basis can be cost or market value at a certain time. The time can be at acquisition, at decedent's death, at distribution or

relate back to cost of previous holder, but the time fixed must be at some period determined by property rights as ruled by the laws of the States.

Congress has the power to fix a holding period for capital assets other than determined by State law, but its definition must clearly indicate the beginning of such period at a point determinable from the time of acquisition under the State laws. Congress has uniformly recognized its limitation and has never attempted to define the time of acquisition contrary to the State laws. In the 1921, 1924 and 1926 Acts it established the basis for gain or loss at cost or the fair market value at the time of acquisition. In the 1928 Act it established three bases, to-wit: (1) Cost, (2) Value at time of acquisition or time of death of decedent, and (3) Time of distribution. In the 1934 Act it abandoned the bases at the time of death and time of distribution and returned to the two bases of cost or fair market value at the time of acquisition as under the 1926 Act.

THE REVENUE ACT OF 1928.

To compute the gain and determine the rate of tax on the sale of property, it is necessary to construe the relevant provisions of the Revenue Act in force at the time of the sale in 1929. This was the Revenue Act of 1928, 45 Stat. 791, and is entitled "An Act to reduce and equalize taxation, provide revenue and for other purposes."

Title 1, Income Tax, is divided into subtitles A to C.

Subtitle B, General Provisions, is again divided into Part I, Rates of Tax, and Part II, Computation of net income, followed by four other distinct parts, which are not material.

Under Part I, Rates of Tax, we have Section 11, Normal Tax on Individuals, Sec. 12 (a) Surtax on Individuals and Sec. 12 (c) Capital Net Gains and Losses. For rate and computation of tax in lieu of normal and surtax * * * see Sec. 101.

Under Part II, Computation of Net Income, Sec. 21, Net Income, Sec. 22 Gross Income, Sec. 22 (e), Determination of gain or loss and * * * In case of a sale or other disposition of property the gain or loss shall be computed as provided in Sec. 111, 112 and 113.

Sec. 101 we find under subtitle C, Supplemental Provisions, Supplement A, Rates of Taxes. Sec. 101, Capital Net Gains and Losses.

Sec. 111, 112 and 113, we find under subtitle C, Supplemental provisions, Supplement B, Computation of net Income, Sec. 111, Determination of amount of gain or loss. Sec. 112 Recognition of Gain or Loss. Sec. 113 Basis for Determining Gain or Loss.

Under Subtitle C, Supplemental Provisions, Supplement E, Estates and Trusts, we find Sec. 168, Capital Net Gains and Losses providing for taxing capital net gain or loss to the beneficiary or estate or trust under Sec. 101 (a) and (b).

From the division into titles and sections and the sharp outlined structure and composition of the Act, it is clearly evident that the different parts and their respective sections were intended to define and outline the subjects therein contained without limitation by or inference from the others.

The computation of net income was to be under the provisions of Part II and Supplement B of Subtitle C.

The rates of tax upon the income were fixed by the provisions of Part I and Supplement A and E of Subtitle C.

Each subject was treated wholly within its respective part and supplement without reference to or consideration for the provisions of the other part or supplement.

The ruling sections beginning as Sections 202, 206 and 210 of the Act of 1921, and 204, 208 and 210 of the Acts of 1924 and 1926, thus became in the Act of 1928, Section 113: Basis for Determining Gain or Loss; Sections 101 and 168: Capital Net Gains and Losses; and Section 11: Normal Tax. These sections of the Act of 1928 so far as material in this case appear in the Appendix (pp. 62-63).

Sections 113 and 101 as they were worded under Sections 202 and 206 of the Act of 1921 were construed in *Johnson v. Commissioner* in 52 Fed. Rep. 2nd 726, and Judge Buffington in his opinion said:

> "But this contention overlooks the fact that, while Section 202 relates to the basis for determining, in a proper case, the amount of gain of a taxpayer, Section 206 relates to determining what is required of a taxpayer to bring himself within its terms. In that respect, 206 is clear and self-explanatary, viz., a taxpayer who has acquired and held property for profit or investment for more than two years."

Following this in *Shoenberger v. Burnett,* 55 Fed. 2d, 543, the Court of Appeals of the Dist. of Columbia, Hitz, J., says:

> "The taxpayer contends that his gain made taxable by Section 202 (a) was 'capital net gain' under Section 206 (a) from 'capital gain' under 206

(a) (1) derived from 'capital assets' as intended to be defined by Section 206 (a) (6), and therefore he is entitled to the benefits of Section 206 (b).

The difficulty in maintaining this position is that the Act of 1921 divided as it is into different sections, dealing with different matters and situations, does no more by Section 202 (a) (2) than say he shall pay a tax on the difference between what his donor paid for the stock and the sale price thereof.

The percentage of tax thereon is prescribed by the later Sections 210 and 211.

But Section 206 comes between, and offers an alternative method of computing the tax to any individual taxpayer who for any taxable year derives a capital net gain (b).

And it does more. It contains its own definition of capital net gain as being the excess of the total amount of capital gain over the sum of capital deductions and capital net losses. Section 206 (a) (4).

And it also contains its own definition of 'capital gain' as being taxable gain from the sale of exchange of 'capital assets', Section 206 (a) (1).

While its sixth and final definition is that of 'capital assets' is property acquired and held by the taxpayer for profit or investment for more than two years. Section 206 (a) (6).

By that definition, Congress indicated a purpose to benefit by 206 (b) only taxpayers who having acquired property held it for profit or investment for more than two years."

In *First National Bank of Boston v. United States*, 76 F. (2d) 200, Wilson J., says, in speaking of the 1928 Act:

"Sec. 101 and Sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of the gain, whether capital gains or income. They are not interdependent in the sense that the date from which gains or losses are computed must in all cases be the same as when the property was acquired by the taxpayer."

From the structure of the Act and from the decisions above cited, we must conclude that in the case at bar, Sec. 101 prescribes the method of determining the rate of tax and Sec. 113 provides the method for arriving at the base amount to be taxed. If, under the laws of the State, the property has been acquired and held for two years it qualifies as capital assets within the definition set in Sec. 101, and once eligible, its tenure cannot be outlawed by a construction placed upon the provisions of Sec. 113. Each section is self contained and rules for its particular purpose.

The Circuit Court of Appeals Erred in Affirming the Determination That the Date Which Governs for Gain or Loss Purposes in Sec. 113 (a) (5) of the Revenue Act of 1928 Must Be Used in Fixing the Date of Acquisition for Capital Gain Determination Under Sec. 101 (8) of Said Act, Thereby Voiding Any Previous Holding Period.

The controversy in the case at issue arises out of the amendment in 1928 of the Gain or Loss Sec. 113 (a) (5), Property transmitted at death.

The 1926 Act provided: If the property was acquired by bequest, devise or inheritance, the basis shall be the fair market value of the property at the time of such acquisition.

This was amended in part in 1928 to read: In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.

The basis for gain or loss was thus changed from time of acquisition to time of distribution and the respondent determined that because it had been changed for gain or loss, the changed date must be used also for capital gain determination, as it would be inconsistent to hold that the property had been in the hands of the beneficiary prior to the time of distribution.

The Board of Tax Appeals and the Circuit Court of Appeals affirmed the position of the respondent.

In this we contend they erred because no substantial change was made in Sec. 101 in 1928 and no reference to capital gains was made in any of the Committee Reports. The reason for the change in Sec. 113 was the confusion caused by the decision in the Court of Claims in *McKinney v. United States,* 62 Ct. of Cl. 180, in the existing law as to the basis on which an executor must determine gain or loss on a sale of property of the estate. The purpose was to particularly specify and define the basis for gain or loss on property transmitted at death for the first time as the time of the death of the decedent and time of distribution, instead of the very general term of time of acquisition. This is confirmed by the Report of the Senate Committee on Finance and the Report of the Conference Committee on the Revenue Bill of 1928, which are set out in full in the Appendix (pp. 67 to 69). Their reports show conclusively that Congress had no intention of modifying or restricting the interpretation of the definition of "Capital Assets" in Sec. 101 (c) (8).

CAPITAL ASSETS DEFINED.

The capital gain section first appeared in the Revenue Act of 1921, and in Sec. 206 (a) (6), we find:

> "The term 'capital assets' as used in the Section means property acquired and held by the taxpayer for profit or investment for more than two years * * *

The definition of capital assets in Sec. 208 (a) (8) of the Revenue Act of 1924 is as follows:

> "The term 'capital assets' means property held by the taxpayer for more than two years."

This same phrase appears in Sec. 208 (a) (8) of the Revenue Act of 1926 and in Sec. 101 (c) (8) of the Revenue Act of 1928.

In *First National Bank of Boston v. United States*, 76 F. (2d) 200 (C. C. A. 1), Wilson, J., says:

> "In the 1921 Act, Sec. 206 (a) (6), it was provided that to constitute capital assets property must be 'acquired and held for two years.' In subsequent acts the word 'acquired' has been omitted, the obvious reason is that the word 'acquired' was surplusage, since, in general, property is held from the time it is acquired or one's ownership begins."

In referring to the definition of capital assets, Mr. Justice Butler, in *Helvering v. New York Trust Company*, 292 U. S. 455, says (p. 468):

> "The Revenue Act of 1926, Para. 208 (a) (8), contains substantially the same language as that used in the 1921 Act to define capital assets. That part of the subdivision is followed by rules for determining the period for which the taxpayer has held the property."

The rules referred to in Mr. Justice Butler's opinion were those added to Sec. 208 (a) (8) in the Revenue Act of 1926 as follows:

> "In determining the period for which the taxpayer has held property, however acquired, there shall be included the period for which such property was held by any other person, if under the provisions of Sec. 204, such property has for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

These rules prescribe the method to be followed in tacking to the taxpayer's holding period the tenure of a previous holder to make up the two-year holding period in order to qualify the property as capital assets.

To identify the property, reference was made to Sec. 204 but after the property is identified as having the same base value for gain or loss in the hands of the previous holder as provided in Sec. 204, the question of whether or not it qualifies as capital assets is determined under the provisions of Sec. 208 (a) (8). There was no intention to restrict the definition of capital assets. The purpose was to specifically authorize the increase in the class of holders of capital assets by including the tenure of former holders.

As said in *Helvering v. New York Trust Company, supra*:

> "In view of the inclusion of the same definition in the Acts of 1921, 1924 and 1926, and the legislative purpose underlying it, the contention that the new words were added to change the meaning of capital assets as defined in the earlier acts is without force."

That Congress had no intention of changing the meaning of the definition of "capital assets" is best evidenced by the Report No. 52 of the Senate Committee on Finance and Report No. 356 of the Conference Committee on the Revenue Bill of 1926, the relevant portions of which are submitted in the Appendix (pp. 71-72).

These reports of the Congressional Committees clearly indicate the purpose is to add to the class of capital asset holders by enlarging the scope of the definition. No change is made in definition of the two-year holding period, but its construction is broadened to allow the tenure of the taxpayer and that of a previous holder to make up the two-year period. There is no intimation of an intention to restrict the definition in any way.

The provisions of Sec. 204 of the 1926 Act were reenacted in the 1928 Act as Sec. 101 and 168, without change in substance.

If there was no intention of changing the meaning of capital assets by the added provisions of the 1926 Act, it follows that there could be no such intention by their re-enactment in the 1928 Act.

Under the 1926 Act the petitioner would have been entitled to the capital gain privilege, because it so happened that under its provisions the basis for gain or loss was the time of acquisition, which has always heretofore been the date used in determining capital assets.

Under the 1928 Act, the base date for determining gain or loss was changed to time of distribution, but the requirement for capital assets remained a period of more than two years from time of acquisition.

TENURE FOR CAPITAL GAIN DETERMINATION BEGINS AT TIME OF ACQUISITION.

The time of acquisition was originally made the ruling element in determining capital assets and remains the ruling element. The time of acquisition is at the date the property was acquired by the taxpayer. The courts have so determined.

In *Dunigan v. Burnett*, 66 F. (2d) 201, (CADC), June 5, 1933, the Court said at page 202, in discussing the definition of capital assets in the Revenue Act of 1921:

> "In the case of stocks, bonds and lands bought for investment as an entirety, the applicability of the provisions of the statute depends solely on the time of acquisition."

In *Hooper v. Commissioner*, 26 BTA 758, the Board determined that a taxpayer who had acquired property on October 10, 1925 and sold the same at a profit on October 10, 1927, did not hold the property for more than two years, and said, at page 760:

> "In order for the petitioner to get the relief here sought, she must have held the property for more than two years from the time she acquired it."

In *Shaffer v. Commissioner*, 28 BTA 1294, the Board said at page 1309:

> "The two-year period mentioned in Sec. 208 (a) (8) begins to run from the date of petitioner's acquisition of the property and not from the date of payment therefor or the date when additional costs in respect thereof were incurred."

We have for determination then the question: When did the petitioner acquire her property for capital gain determination? Under the Pennsylvania law, the gift

by assignment was a valid transfer of the property and she acquired it at that time. Under the Revenue Act of 1928 and the rules prescribing the determination of capital assets, the petitioner could add to her holding period, the tenure of her donor and to determine this we must consider the Pennsylvania law. Under the Pennsylvania decisions cited *supra* (pp. 9-10), the property of decedents vests at the time of death. In *Greiner's Appeal,* 103 Pa. 89, it was held that the election which the widow made vested in her immediately and absolutely, one-half of the estate of the decedent, subject to the payment of his debts and administration expenses. This is conclusive that the property given to the donee by the widow donor was acquired by the widow on June 28, 1919. Petitioner's tenure, therefore, was from 1919. This finding is supported by this Honorable Court in *Brewster v. Gage,* 280 U. S. 327, in which it was necessary for the Court to construe Sec. 204 (a) (5) of the Revenue Act of 1921, as follows:

> "If the property was acquired by bequest, devise or inheritance, the basis shall be the fair market value of the property at the time of such acquisition."

Mr. Justice Butler, in his opinion, says (p. 333):

> "It is necessary to construe the word 'acquired' and the phrase 'at the time of such acquisition' to determine whether the value of the stock at the time of testator's death or its value on the date of the decree should be used in the calculation.
>
> Upon the death of the owner, title to his real estate passes to his heirs or devisees. A different rule applies to personal property. Title to it does not vest at once in heirs or legatees. *United States v. Jones,* 236 U. S. 106, 112. But immediately upon the death of the owner there vests in each of them

the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution. *Sanders v. Soutter,* 136 N. Y. 97; *Vail v. Vail,* 49 Conn. 52, *Cook v. McDowell,* 52 N. J. Eq. 351. Upon acceptance of the trust there vests in the administrators or executors, as of the date of death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. *Foster v. Fifield,* 20 Pick. 67, 70. *Wager v. Wager,* 89 N. Y. 161, 166. *Thompson v. Thomas,* 30 Miss. 152, 158.

Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property. And, notwithstanding the postponement of transfer of the legal title to him, Congress unquestionably had power and reasonably might fix the value at the time title passed from the decedent as the basis for determining gain or loss upon sale of the right or of the property before or after the decree of distribution. And we think that in substance it would not be inconsistent with the rules of law governing the descent and distribution of real and personal property of decedents to construe the words in question to mean the date of death."

This case recognized the rule of tax law that property transmitted at death is acquired at date of death. It was adopted and followed in *Chandler v. Field,* 63 F. (2d) 13 (CCA1), in which the Court says (p. 15):

> "The shares came to John P. H. Chandler, who acquired a vested interest in his mother's estate at the time of her death. He sold the stock; he made the gain; and, as was held in *Brewster v. Gage,* acquired the property, within the meaning of section 204 (a) (5) of the Revenue Act, at the time of his mother's death. And this being so, the gain is determined by deducting the value at her death from the sum received from the sale. If these specific shares held by the mother at the time of her death had not come to Mr. Chandler, he could not have sold them and made a gain and could not be taxed. But that has little to do with this case, for he did receive the stocks and sold them, and, by so doing, made a gain over and above their value at the time of his mother's death, which, according to *Brewster v. Gage,* was the time he acquired the property within the meaning of section 204 (a) (5)."

The rule has been followed and extended by the Board of Tax Appeals in the following cases:

In the case of *Abeles v. Commissioner,* 24 B. T. A. 435 (Acquiesced in by the Commissioner XI-1 C. B. 1), the Board held that stock received by the sons of the testator from a trustee of a residue-trust created under the will of their father was acquired by them on the date of the death of their father. In the opinion reference is made to the case of *Brewster v. Gage* and the Board says: "There, possession and dominion by the legatees was deferred during an indeterminate period of administration; here, possession is postponed for not

to exceed a five year trust period, the legatees meanwhile receiving the income earned by the stocks. We hold therefore, that the stocks in question were acquired upon the death of Julius D. Abeles on August 15, 1920."

See also *Griscom v. Commissioner,* 22 B. T. A. 979, *Security Trust Co. v. Commissioner,* 25 B. T. A. 29, affirmed, *Security Trust Co. v. Commissioner,* 65 F. (2d) 877 (C. C. A. 6, June 29, 1933), *Barber v. Commissioner,* 25 B. T. A. 513."

For capital gain determination under the provisions of the 1921 Act, the Commissioner has held that the period of holding commences with the date of decedent's death. I. T.1889-C. B.-III-1-1278.

In Income Tax ruling 1889 III-1 C. B. 70, the Commissioner has stated that under the definition of "Capital Assets" appearing in Section 206 (a) (6) of the Revenue Act of 1921, which is similar to the provisions of Section 101 (c) (8) of the Revenue Act of 1928 here in question, the two-year period during which assets must be held in the case of property received under the terms of a will, commences with the date of the testator's death. This ruling was promulgated prior to June, 1924, and is set forth here in full.

> "Advice is requested in regard to the Federal income tax liability arising from the sale by the taxpayer in 1922 of certain securities which he received in 1921 as part of his distributable share of the estate of his father, who died in 1919.
>
> "The particular question raised is whether the two-year period during which capital assets must be held entitle the taxpayer to the benefit of the provisions of section 206 of the Revenue Act of 1921 ran from the date of the testator's death or from the later date on which the beneficiary actually received possession of the securities.

I. T. 1889 continued.

The question requires a determination of the meaning of that part of section 206 (a) (6) which provides:

> 'The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years * * *'

It is well settled that the interest of a distributee of a decedent's estate attaches upon the date of the decedent's death. Mr. Justice Holmes thus states the rule in *Hooper v. Bradford,* (1901) (178 Mass., 95, 97):

> 'The time when the property passes under a deed is not later than the death of the grantor. The same is true in the case of a will. It is true that in the later instance the interest of a legatee is subject to an account, but still it is an interest in the fund as it is, analogous to that of a *cestui que* trust, and vests at the death of the testator.'

To the same effect is *Mechanics' Savings Bank v. White,* (1889) (150 Mass., 234). The rule is the same in the case of intestacy, according to *Perryman v. Green* (1863) (39 Ala., 133):

> 'The right of a distributee attaches upon the death of the intestate. The interest then accrues, and the subsequent division serves to ascertain and define, convert it into a legal right, and reduce to possession, an equity which existed before in the form of a chose in action, cognizable in chancery.'

In an article in *21 Harvard Law Review,* 436, the result of the authorities is thus summarized:

> '* * * Neither an executor nor an administrator takes any beneficial interest in the

I. T. 1889 continued.

> decedent's property. And on the death of the testator or intestate, both legatees and next of kin get an immediate interest in the personal estate analogous to that of a *cestui que* trust.'

The Department has adopted this doctrine in regulations and rulings, holding that a distributee of property from a decedent's estate acquires at the date of the decedent's death for the purpose of determining gain or loss from its sale by such distributee. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34).

Granted, then that a distributee acquires an immediate interest in the decedent's estate the date of the decedent's death, and that this interest is analogous to that of a *cestui que* trust, is this interest 'property acquired and held by the taxpayer' from the time of death? In other words, does the quoted phrase embrace simply legal interests in possession, or does it further embrace the beneficial interest of a distributee, which later is converted into a legal interest by the actual distribution?

That Congress did not intend to require legal title and possession by the use of the terms 'acquired and held' in defining capital assets is strongly indicated by subdivision (c) of section 206, stating the method for the application of the section to cases of partnership, estates or trusts. The subdivision provides:

> 'In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be sepa-

I. T. 1889 continued.

rately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section.'

These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section 206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. If the phrase 'property acquired and held by the taxpayer' in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (c) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned. Since the section should be construed so as to give effect to both provisions, rather than merely one (*Monroe Co. v. Riordan* (1922) (280 Fed., 624, 626)), it appears that Congress did not intend the words 'property acquired and held by the taxpayer' to refer exclusively to legal property interests; but that beneficial interests in property are also included. Moreover, according to the doctrine of the cases quoted *supra*, a distributee of a decedent's estate has an interest vesting at the decedent's death analogous to that of a *cestui que* trust; section 206 (c) expressly grants to a *cestui* the privilege of determining his tax in the manner provided by that section; accordingly, the distributee should be accorded a like privilege.

Further, in view of the express purpose for enacting the section it is very unlikely that Congress intended to distinguish between legal and beneficial interests in its application. It is well known

I. T. 1889 continued.

that section 206 was adopted to provide relief for taxpayers who realize in a single year a gain accumulated over several years (see notes on the Revenue Act of 1918, pp. 15-16; report from Committee on Ways and Means, dated August 16, 1921, p. 10; report from Finance Committee dated September 26, 1921, p. 12). The reason for the enactment is directly applicable to the instant case. The property in question was acquired by the taxpayer under the regulations at the date of the testator's death; the gain resulting from its sale is one accumulated over more than two years, during all of which time it has been retained for the taxpayer. The fact that during part of that period an executor or administrator was in possession of the property should not affect the result, since the taxpayer acquired the property at the testator's death, and thereafter the beneficial ownership was in him.

Moreover, the Department has adopted the view, both in the regulations and in its rulings, that the phrase 'acquired and held by the taxpayers' does not require actual possession of the assets in all cases. Article 1651 of Regulations 62 provides in part:

> "* * * The specific property sold or exchanged must have been held for more than two years, but in the case of a stock dividend the prescribed period applies to the original stock and the stock received as a dividend considered as a unit and where property is exchanged for other property and no gain or loss recognized under the provisions of section 202, the prescribed period applies to the property exchanged and the property received in exchange considered as a unit. * * *"

I. T. 1889 continued.

In neither of these cases would the taxpayer have had possession during the two-year period of the specific property disposed of, although the identity of the particular investment during that time would be sufficiently established. In I. T. 1660 (C. B. II-1, 36), in which the exact question herein has been considered by the Unit, it has been held that the two-year period provided in section 206 (a) 6 begins to run on the date of the decedent's death.

Finally, as stated above, it is well settled that for the purpose of computing gain or loss from the sale by the beneficiary of property acquired by bequest, devise, or inheritance, the property is acquired by the beneficiary as of the date of the decedent's death. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34). Hence, in the instant case, the taxpayer acquired the securities at the date of the decedent's death; and that particular investment has been kept intact as the taxpayer's from that date to the date of sale, a period of more than two years. The gain thereby realized represents an accumulation over a period of more than two years. In view of the indications within the section itself that a taxpayer possessing a beneficial interest in property may have the benefit of its provisions, and of the construction placed upon the section by the regulations and rulings, it is held that the taxpayer herein is entitled to compute his tax with reference to the gain on the sale of the securities here in question on the basis provided in section 206."

These rulings of the Commissioner of Internal Revenue are still in effect as they have never been amended or revoked, since the date on which they were promulgated.

The Commissioner, by sound reasoning, thus ruled under the 1921 Act that where the taxpayer acquired securities at the date of decedent's death and that particular investment has been kept intact as the taxpayer's from that date to the date of sale, a period of more than two years, the gain realized represents an accumulation of over two years and the taxpayer is entitled to compute his gain at capital gain rates.

By the reenactment of the same provisions without change in the Revenue Acts of 1924, 1926 and 1928, this administrative interpretation and construction of the 1921 Act must be considered as having the approval of Congress:

Helvering v. Bliss, 293 U. S. 144;
Brewster v. Gage, 280 U. S. 327;
United States v. Dakota-Montana Oil Co., 288 U. S. 459.

In the case at bar he has not followed his previous rulings. The amendment to the gain or loss section has led him into the error.

Respondent has not given proper consideration to the position of the widow's interest under the Pennsylvania law. Strictly speaking it rises higher than any of the classes of property set out in Sec. 113 (a) (5) as being transmitted at death. It was an interest created by Pennsylvania Statute and in taking it the widow can thus set aside any specific bequest, or general or specific devise of real estate, which interferes with her receipt of one-half of the estate.

In *Evans's Estate*, 150 Pa. 212, Mr. Chief Justice Paxson, says (P. 218):

> "It is the settled rule in Pennsylvania that where a wife elects to take against her husband's will, equity executes the substituted devises and

bequests to the wife as a trust in her for the benefit of disappointed claimants to the amount of their interest therein, and the Court will assume jurisdiction to sequestor the benefit intended for the refusing wife in order to secure compensation to those whom her election disappoints: (*Sandoe's Appeal*, 65 Pa. 314; *Gallagher's App.*, 76 Pa. 296; *Young's App.*, 108 Pa. 17; *Ferguson's Est.*, 138 Pa. 208; *Bationes Est.*, 136 Pa. 307)".

The interest of the widow thus takes precedence and is preferred over any specific bequest or general or specific devise of real estate and in construing the taxing laws she is entitled to at least as favorable a position from a capital gain standpoint. In a like case the legatees and devisees are entitled under the 1928 Act to claim capital gain *tenure* from date of death. As she may have a prior right to the same property, her *tenure* could not be any less than theirs. She had an absolute right at her husband's death and her *tenure* cannot be construed to begin after that time without disregarding the rules of property prevailing in Pennsylvania.

The date of decedent's death is the time of acquisition by the widow and this date governs for capital gain purposes.

The determination that the date which governs for gain or loss purposes must be used in fixing the date of acquisition for capital gain determination is therefore in error.

The Circuit Court of Appeals Erred in Affirming the Determination That the Petitioner's Basis for Determining Capital Gain or Loss Was Limited, Reduced and Restricted by Sec. 113 (a) (5) of the Revenue Act of 1928 and That November 3, 1927 Is the Date Which Governs the Determination of Capital Net Gain or Loss.

The property sold by the petitioner was distributed and delivered to her on November 3, 1927. Her interest in the property was given to her in trust on June 23, 1924 and absolutely on August 1, 1925 by written assignments by her mother. (R. 34 and R. 35).

Her mother, the donor, acquired a vested interest in the property at her husband's death on June 28, 1919, and for capital gain determination, the petitioner's holding period added to the donor's holding period amounted to almost ten years at the time of sale on March 19, 1929. The Board of Tax Appeals in its opinion in the case at bar, says (R. 23):

> "The petitioner contends that whatever the amount of profit, it was a capital net gain within the meaning of the statute, and respondent contends that it was ordinary net profit and not taxable under the capital net gain provisions of the statute. The contentions of the respondent are set forth in his deficiency notice to the petitioner under date of December 16, 1932, as follows:
>
> * * * * * * *
>
> 'It appears that the stock in question was acquired under an assignment by your mother of a portion of her interest in the Estate of T. H. Given and the basis for gain or loss in accordance with Section 113 (a) (2) of the Revenue Act of 1928 is the same as it would have

been in your mother's hands. Therefore, the period during which your mother held the property should be added to the period it was held by you in order to determine the total period for which the particular property was held.

In this case, the decree of distribution of the stock was not made until November 3, 1927, and that governs for gain or loss purposes under Section 113 (a) (5) of the Revenue Act of 1928. In view of this fact it is inconsistent to hold that the stock was in your mother's hands prior to November 3, 1927, the date of the decree of distribution. That date which governs for gain or loss purposes as the law specially so provides should be used also for capital gain determination. * * *

The opinion continues: (R. 27)

"It will be noted from our findings that T. H. Given died testate on June 28, 1919. In his will he made no provision for his widow. The widow, on July 3, 1919, elected to take against the will of her deceased husband, one-half of his estate in lieu of her dower under the laws of Pennsylvania. By virtue of such election one-half of the estate of her deceased husband vested in her immediately and absolute. *Re Greiner's Appeal,* 103 Pa. 89. It was not, however, one-half of the specific assets of the estate which became her property by virtue of the election, but only one-half of the estate after the debts and other charges of administration should be paid. * * *

Continuing: (R. 28)

"While the shares of stock were in the custody of the executors they were not in any proper sense 'held' by the petitioner. * * * She sold the shares

of stock which were distributed to her by the executors of the estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the executors of the estate and not in the petitioner. In view of these facts we think it cannot be said that the petitioner held them for a period of two years at the date of sale. The respondent's contention on this point is sustained."

The Circuit Court of Appeals for the Third Circuit affirmed the Board of Tax Appeals in its decision.

In *Dibblee v. Commissioner,* 29 B. T. A. 1070 (February 3, 1934), the Board said

"Petitioner had acquired the securities by general bequest under the will of her deceased mother and they were distributed to the petitioner under a decree of final distribution dated May 21, 1927. Prior to that date the possession of the securities was in the executors of the estate for purposes of administration and not in the petitioner. In view of these facts we conclude that the petitioner had not held the assets within the meaning of Section 101, for a period of two years before they were sold and is, therefore, not entitled to report that profit as capital net gain."

This decision was affirmed by the Ninth Circuit Court of Appeals, in opinion reported in 75 F. (2d) 617, in which the Court says:

"The controversy arises from an application and interpretation of the provisions of Section 101 and Section 113 (a) (5), which definitely establish both the method of determining the period of holding and the basis for the determination of the taxpayer's gain. They are to be read together and when done so, on all personal property acquired by

specific bequest the basis shall be the fair market value of the property at the time of the death of the decedent, and if the property be acquired either by will or by intestacy the basis shall be the fair market value of it at the time of distribution to the taxpayer. Capital assets, as defined by Section 101 (c) (8) of the Revenue Act means 'property held by the taxpayer for more than two years.' Petitioner asserts that under these provisions of the act the profit resulting from the sale of the securities was 'capital gain' and, consequently, taxable as such, and not as 'ordinary income', and if correct there would be no deficiency.

The securities upon which petitioner realized a profit of $28,441.86 were the property of decedent at the time of her death, which was more than two years before the date of sale, and were acquired by petitioner as a general bequest of personal property by will, and would seem to be governed by the provision in Section 113 (a) (5) of the act, that

> 'In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.'

But it is argued by the petitioner that the laws of California determine the date from which the taxpayer 'held' the securities in question, as under the laws of that State the legal title to property transmitted by will or intestacy vests immediately upon the decedent's death in the devisee, legatee or heir, as the case may be. We can not agree with the correctness of the contention, for the Federal statute determines the time the taxpayer 'acquired' personal property, when acquired as a general bequest by will, to be at the time of the distribution to the taxpayer, and not at the time of decedent's

death. Therefore, the taxpayer is considered as 'holding' the securities only from the time of distribution. The purposes or effect of the revenue laws of the United States cannot be contravened by state law. *Burk-Waggoner Assn. v. Hopkins,* 269 U. S. 110; *Weiss v. Wiener,* 279 U. S. 333; *Corliss v. Bowers,* 281 U. S. 376, 378.

The decision of the Board of Tax Appeals is affirmed."

In a similar case, *Ogle v. Helvering* (77 F. (2d) 338) (C. C. A. 2) reported in C. C. H. '35, Vol. 3, Par. 9366, affirming an unpublished memo opinion of the Board of Tax Appeals in a *per curiam* opinion, the Second Circuit Court says:

"This appeal involves a question of the meaning of 'capital assets', as that term was used in Sec. 101 (c) (8) of the Revenue Act of 1928. Mrs. Ogle, the taxpayer, was one of the next of kin of one, Rand, who died intestate on October 31, 1925, leaving some shares of stock as part of his estate, which his administrator distributed to her on January 28, 1927, and which she sold on May 28, 1928, at an advance above their value at distribution. The question is whether she 'held' the shares from October, 31, 1925, or from January 28, 1927; on this depends her privilege under Sec. 101 (a) to limit her tax to one-eighth of the gain. If she 'held' them only from the date of distribution, the gain was part of her ordinary income, as the commissioner and the Board have held. The Circuit Court of Appeal of the Third and Eighth Circuits have decided the point in favor of the Treasury; that of the First, *contra*. *McFeely v. Helvering,* 74 Fed. (2) 1017 (C. C. A. 3); *Dibblee v. Helvering,* 75 Fed. (2) 617 (C. C. A. 9); *First National Bank v. United*

Ogle v. Helvering continued.

States, 75 Fed. (2) .... (C. C. A. 1). Although it is extremely likely that the Supreme Court will allow certiorari, we must nevertheless decide the case, else the taxpayer may not secure an independent hearing in that court.

Brewster v. Gage, 280 U. S. 327, on which the taxpayer relies, does not help her. It did hold that the word, 'acquired', in the Acts of 1918 and 1921, referred to the death of the taxpayer's ancestor; it did not even intimate that 'acquired' and 'held' were synonymous. But that aside, the question before the court was not of the two years period under Sec. 101 (a) or its predecessors, but barely as to the proper 'basis' for a gain taxed as ordinary income. At least in the Act of 1921, Sec. 202 (a) (3) expressly fixed the date of 'acquisition' as the date for the 'basis'; section 113 (a) (5) of 1928 fixes the date of distribution in the case of intestacies of the personalty, as the opinion in *Brewster v. Gage* observed. This taxpayer cannot afford to concede that the date of 'acquisition' is the date of the 'basis', even though 'acquisition' and 'holding' were the same. Moreover, she cannot tack the administrator's tenure before distribution to her own; under the Act of 1928 tacking is controlled by subdivision B. of Sec. 101 (c) (8) and is permissible only when the 'basis' of the taxpayer under Sec. 113 is the same as that of a predecessor in tenure. The 'basis' of the administrator is fixed by Sec. 113 (a) (5) as the value at the death of the intestate. The taxpayer to succeed must prove as *res integra* that she 'held' the shares throughout the period of administration.

Section 113 (a) (5) was pretty plainly drafted in conformity with the general municipal law re-

lating to estates. Gains on devises, realty descended, and specific legacies were measured from the death of the ancestor; on pecuniary and residuary legacies and on intestacies of personalty, from distribution; in all cases coinciding with the vesting of title at common law. It seems to us that this pattern ought not only to determine the 'basis', but the period on which the privilege should depend. The word 'held', is indeed colloquial; we need not say that it always implies possession; it does not. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455; *Commissioner v. Nevius*, 76 Fed. (2) .... (C. C. A. 2). But in this context we think it does. Otherwise we should have to say that between the intestate's death and distribution the administrator and the next of kin both 'held' the personalty. The administrator, had he kept the shares for more than two years after the intestate's death and then sold them, would surely have had the privilege conferred by Sec. 101 (a), like an individual. If he 'held' during that period, the next of kin did not, yet unless he did, he may not limit the estate's tax. Moreover, in general the statute makes the time at which the 'basis' is fixed, the starting point of the period which determines the privilege. So strong is this as even to control the term 'held' when its natural meaning is otherwise. *Helvering v. N. Y. Trust Co., supra,* (292 U. S. 455). Here we need do no violence to that word in order to conform with the general plan; rather we should have to wrench it unduly to do anything else. Finally, the privilege is in any case a partial exemption, and the taxpayer must bring herself clearly within it.

Order affirmed."

The Board of Tax Appeals and the Second, Third and Ninth Circuit Courts in affirming them have taken

the narrow untenable position that in decedents' estates no property right existed which could be interpreted as "being held" by the distributee until reduced to possession by distribution. In these cases they decided the distributees had not held the assets within the meaning of Section 101 for a period of two years before they were sold and that the two-year period commenced to run from the date of distribution, when the petitioners actually acquired physical possession of the personal property.

This is in direct conflict with the decision in *Brewster v. Gage*, 280 U. S. 327, in which this Court says:

> "The decree of distribution confers no new right, it merely identifies the property remaining, evidences right of possession in the heirs or legatees, and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of death."

The Supreme Court thus sustained one of the rules of property which exists in most of the States that title to property passing by bequest, devise or inheritance is acquired at the date of decedent's death.

The Ninth Circuit Court, however, in *Dibblee v. Commissioner, supra*, says:

> "We cannot agree with the correctness of this contention (that the legal title to such property vests upon decedent's death as held in *Brewster v. Gage, supra*) for the Federal Statute determines the time the taxpayer 'acquired' personal property, when acquired as a general bequest by will, to be at the time of distribution to the taxpayer, and not at the time of decedent's death."

This interpretation of Sections 101 and 113 can only be from a strained inference and not from the actual wording of the provisions "capital assets means property held more than two years", and "if the property was acquired either by will or intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer". It cannot be supported by giving the words used in these provisions their usual and ordinary meaning and this is the meaning required to be given statutes in their interpretation by the Supreme Court as decided in *DeGanay v. Lederer*, 250 U. S. 376, in which the Court said at page 381:

> "Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and within the meaning commonly attributable to them".

The word "held" as used in regard to property, as in Section 101 (c) (8), means "owned" or "having title to" and property "owned" by a taxpayer is property "held" by the taxpayer. The word "acquire" means "to get or gain", "to get as one's own", or "to get as one's own, as to acquire a title." These meanings appear in the standard dictionaries without qualification.

Thus it would appear that the Second and the Ninth Circuit Courts have placed an unusual, limited and restricted meaning on the words "held" and "acquired" in the statute in determining that under Sections 101 and 113 personal property acquired as a general bequest by will, is not acquired at decedent's death but is acquired at time of distribution, and to decide therefore that the taxpayer is considered as "holding" the securities only from the time of distribution.

The Ninth Circuit Court dismisses these decisions of the Courts concerning the vesting of property of es-

tates of decedents by citing certain cases to show that the purposes and effect of the revenue laws of the United States cannot be contravened by state law.

In citing these cases the Circuit Court failed to recognize that the issues therein raised and determined were not concerning the basic rules of property and that as the Court said in *Harmel v. Commissioner*, 56 F. (2d) 153, "It is no new doctrine that a rule of property prevailing in a state, and changes in that rule, will be recognized in administering the federal income tax law. *United States v. Robbins*, 269 U. S. 315."

And further as said in *Johnson v. Commissioner*, 56 F. (2d) 58, "State laws do not control federal taxing statutes unless creating a rule of property."

The time the taxpayer acquires property is determined by the law of the States and this was overlooked by the Second and the Ninth Circuits in construing these provisions of the tax law.

The Third Circuit Court in the McFeely case at bar limited themselves in their *per curiam* opinion to affirming the order of the Tax Board without discussion (R. 56).

The Board of Tax Appeals, however, recognized the rule of property as set up in *Brewster v. Gage*, 280 U. S. 327, in saying in the opinion (R. 27):

> "The widow, on July 3, 1919, elected to take against the will of her deceased husband, one-half of the estate in lieu of her dower under the laws of Pennsylvania. By virtue of such election one-half of the estate of her deceased husband vested in her immediately and absolutely. *Re Greiner's Appeal*, 103 Pa. 89."

but then immediately fell into error by drawing a distinction between the equitable title and actual possession in defining the holding period for capital assets, saying in their opinion (R. 28-29):

> "She sold shares of stock which were distributed to her by the executors of the Estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the executors of the estate and not in the petitioner. In view of these facts we think it cannot be said that the petitioner held them for a period of two years at the date of sale."

Thus, although the time of acquisition of title as defined under the state laws was originally made the ruling element in determining "capital assets", and remains the ruling element in all other cases, the Board has placed an unusual and restricted meaning on the words in the statute, in so far as residuary property of a decedent is concerned, and decided that this property is not acquired or held until physical possession is delivered at the time of distribution for the purpose of determining whether or not it is a "capital asset". This position must be predicated on the presumption that under the laws of the State the taxpayer has no valuable interest in the property until delivery of possession.

Possession Not a Controlling Element.

Physical control and possession has never heretofore been considered an essential element in the definition of the word "held" as used in the Capital Gain Section 101 except in the case at bar. The Respondent and the Board of Tax Appeals have not held possession, dominion and control for two years to be requisite in allowing capital net gains to beneficiaries on property sold for them by executors before distribution or in

stock dividends, stock subscription rights, stock purchased on margin, interests in stock exchange memberships issued to old members, agreements to purchase real estate where the original source of title was acquired more than two years before sale.

In the case of specific legacies of securities, if possession is an essential element and the same rule is applied even though the basis for gain or loss under the 1928 Act is date of decedent's death, the holding period for capital gain could not begin until time of distribution and the basis for gain or loss would be different than the date of acquisition.

Thus singling out residuary estates, respondent and the Board of Tax Appeals attempt to amend the capital gain provisions of the Act of 1928, Section 101, by reading into it "capital assets means property the physical possession, dominion and control of which has been held for more than two years," because the basis of gain or loss in Section 113 has been changed in the 1928 Act to date of distribution, and it would be inconsistent to have two dates for these two different purposes.

This directly contradicts the reasoning of the ruling made in I:T 1889 III-1-70 *supra*.

This construction is without precedent and unwarranted and results in an absurd and unjust penalty to petitioner. If she had sold the stock in question on December 31, 1927, she would have been entitled to the capital gain rate on her profit, because *Brewster v. Gage, supra*, established that the property was acquired at the date of decedent's death and she and her donor would have held it more than two years, but if she sold on a day later, January 1st, 1928, she is deprived of the capital gain rate and must pay the ordinary net income

rate because the Court decides she holds it from the date of distribution, notwithstanding the fact that, although the gain and loss section was changed, the capital gain section was reenacted in the Revenue Act of 1928 without change. The penalty is imposed by an interpretation and not by an actual amendment.

We respectfully submit that neither the Circuit Courts nor the Board of Tax Appeals has offered any sound legal theory to support this radical determination that petitioner's basis for capital gain or loss was limited, reduced and restricted by Sec. 113 (a) (5) to the time of distribution, November 3, 1927. This determination is manifestly in error.

The Circuit Court of Appeals Erred in Affirming the Determination That Capital Gain From the Sale of Capital Assets Under the Requirements of Section 101 Is Reduced to Ordinary Net Income Because the Basis of Determining the Gain as Prescribed in Section 113 (a) (5) Sets a Date Over Two Years After the Date of the Actual Acquisition of the Capital Assets.

The provisions of Section 113 should not be considered in determining whether petitioner's property qualifies as capital assets under Section 101. The petitioner acquired property in 1924 by gift. It was an equitable vested interest in an estate. It carried the right to the income during administration, the right to delivery by distribution and the acquisition of the legal title. It had a large monetary value at the time of gift and could have been sold at any time thereafter. It has all the qualifications of property of value as covered by the provisions of the income tax laws.

Under Section 168 the petitioner also had the right before distribution, as an assignee of a beneficiary of the estate, to have her share of the capital net gain or capital net loss determined and taxed to her at the rates and in the manner provided in Sec. 101.

After two years from the date of the gift, her share of the gain or loss on the sale of assets qualified as capital gain or loss, without invoking the privilege of tacking donor's tenure. Conceding her all the rights of a purchaser of the same property, and she had just as legal a title, and considering her paying an income tax on her property from the time of gift, can anyone deny that she was a taxpayer on property held for more than two years, or that she sold capital assets in 1929 when she disposed of the property she had held from 1924. Her property met all of the requirements of the definition. "Capital assets" means property held by the taxpayer for more than two years.

This Court has said in *Helvering v. New York Trust Company*, 292 U. S. 455,

> "In view of the inclusion of the same definition in the Acts of 1921, 1924 and 1926, and the legislative purpose underlying it, the contention that the new words were added to change the meaning of capital assets as defined in the earlier acts is without force."

These same provisions of the 1926 Act were reenacted in the 1928 Act and we must conclude that the original meaning of capital assets was still the same. However, the Commissioner did not so conclude for he has decided that although the property sold meets all of the requirements of capital assets, the profit cannot be capital gain but must be ordinary net income because

under Sec. 113 her gain is the same as the donor's would have been and the donor's base is fixed by the gain and loss section as amended in 1928 as three years after the date of gift and less than two years before the date of sale.

The commissioner thus assumes that the donor had no property of value to give; that the petitioner received nothing in 1924, although a substantial gift tax was paid thereon. This is a violent presumption and without a semblance of merit.

The Commissioner invoked the tacking rule of Section 101 (b) (8) to tie the transaction into Section 113 for the purpose of reducing the holding period, instead of increasing it. Petitioner's profit qualified under the definition of capital assets, without the benefit of the tacking privilege and the commissioner was not called upon to consider any part of the section except the definition "property held by the taxpayer for more than two years".

This conclusion is reached by giving to the capital gain section a new meaning inferred from a change in 1928 in the gain and loss section making a new base for gain or loss from time of acquisition to time of distribution.

An inferential construction from the gain and loss section is thus used to nullify the capital gain provisions under which petitioner's profit fully qualifies as capital gain.

In computing her gain, Section 113 provided that it was the same as her donor. The donor's basis for gain was time of distribution (November 3, 1927), and the amount of profit was thus established within the

provisions of Sec. 113. The one section established the amount of gain and the other section established that the rate of tax thereon was the capital gain rate.

There would be no conflict in thus carrying out the requirements of these sections of the Act and the rules of property prevailing in Pennsylvania would have been recognized in administering the law.

The Board of Tax Appeals admits that the petitioner acquired an equitable interest of value by the gift in 1924 and the profit on its sale in 1929 would have been capital gain. In the opinion (R. 28) the Court says:

> "Conceivably, if in 1929 the petitioner had sold, not the 1,000 Radio stock in question, but her interest in the Estate of T. H. Given, the profit would have constituted capital gain, for she acquired that interest by gift from her mother on August.1, 1925, and would have owned it for a period of more than two years at the date of sale. But she did not sell the gift *res* or a fractional part of it. She sold shares which were distributed to her by the executors of the Estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the executors of the Estate and not in the petitioner. In view of these facts, we think it cannot be said that the petitioner held them for a period of two years at the date of sale".

Thus, in its opinion, it assumes a dual position. An equitable interest held for more than two years and which carries the right to legal title need not be reduced to physical possession to be eligible as capital assets. Part of same interest reduced to possession by distribution is not eligible until legal title is held for more than two years after distribution. The period between ac-

quiring the equitable title and receiving delivery of the certificates is denied the petitioner as a "holding period" for capital gain purposes.

The Commissioner aribitrarily and without legislative authority defines the time of acquisition to be the time of distribution and thus nullifies the vesting of property by postpoining it until distribution. He determines that it would be inconsistent to hold that petitioner obtained property before the date from which gain was to be computed. He overlooked the fact that under Sec. 168 she had the capital gain privilege on profit from the sale on the same property before possession at the time of distribution and that in providing for this privilege Congress recognized her acquisition to be effective before distribution.

There has been no change in the capital gain provisions in the 1928 Act or in any of the Acts after 1921 which limited the capital gain privilege to the tenure from time of distribution. It was only the basis for gain or loss which was so limited.

Following out the purpose of the Act to reduce taxation, Congress decided in the case of residuary and general beneficiaries to tax only that part of the gain on their property which accrued from the time of distribution. They reenacted the provisions of Sec. 168 authorizing the capital gain privilege on this same property if sold during the period from time of acquisition at decedent's death to the time of distribution. They placed no restriction on the capital gain determination as applied to the gain computed on the basis of the time of distribution. The logical conclusion is that they intended the capital gain provisions to apply.

Because Congress waived taxing the gain on the period from time of acquisition to the time of distribu-

tion, the Commissioner, without any legislative authority, refuses to credit the taxpayer with this period in determining the capital gain eligibility.

His position is biased because of reduction in the amount of gain in addition to the application of the lower capital gain rate. This is to him inconsistent in granting too much of a reduction.

There is no authority in the law to support this determination and it is clearly in error.

HOLDING PERIOD BEGINS AT DATE OF DECEDENT'S DEATH.

BASIS FOR AMOUNT OF GAIN IS TIME OF DISTRIBUTION.

As already argued under Sec. 101, the petitioner's tenure for capital gain purposes is the tenure of the donor from date of decedent's death to time of gift, tacked to the petitioner's tenure from time of gift to time of sale. Her gain under Sec. 113 is the difference between the value at the time of distribution and the amount realized by the sale.

This position is supported by the Circuit Court of Appeals for the First Circuit in two cases recently decided.

In the case of *Frances G. Lee v. Commissioner of Internal Revenue* (76 F. (2nd) 203) (C. C. A. 1), which was decided by the Board of Tax Appeals upon authority of the McFeely case at bar (R. 60), the Circuit Court of Appeals for the First Circuit says, in reversing Board of Taxes Appeals unpublished Memorandum Opinion:

> "WILSON, J.: This is a petition for review of a decision of the Board of Tax Appeals. The main issue is the same as that involved in the case of *First National Bank of Boston et al. v. United*

States, decided by this court on March 9, 1935. There was a sale of securities by a residuary legatee in 1929, more than two years after the death of the testator, but less than two years from the date of distribution. The Commissioner assessed the gain in accordance with Sec. 113 (a) (5) of the Revenue Act of 1928, but held it was not a capital gain, which was affirmed by the Board of Tax Appeals. Since the acquisition of the securities sold dates back to the death of the testator, *Brewster v. Gage*, 280 U. S. 327; *Chandler v. Field*, 63 Fed. (2d) 13, 15; certiorari denied, 289 U. S. 758; *Walker v. Hill*, 73 N. H. 254; *Sanborn v. Clough*, 64 N. H. 315, they were held more than two years and should be treated in assessing the tax as a capital gain, although the amount of the gain was properly determined under Sec. 113 (a) (5). See *First National Bank of Boston et al. v. United States, supra.*"

In the case of *First National Bank of Boston et al. v. United States of America* (76 F. (2d) 200), (C. C. A. 1), referred to in *Lee v. Commissioner, supra*, and reversing a like decision in the District Court (7 F. Supp. 915), the Court says:

"Edward E. Blodgett died April 4, 1926. By his will he bequeathed to the petitioners as trustees the residuum of his estate consisting, in part, at least, of securities. Sometime after April 4, 1928, and more than two years after the testator's death, but less than two years after they were turned over to the trustees by the executor of the will, some of the securities were sold by the trustees at a gain of $74,773.08 over their value at the time of distribution, which value, under Sec. 113 (a) (5) of the Revenue Act of 1928, was the basis for determining gain or loss in case of residuary bequests.

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The petitioners contend that under the rule laid down in *Brewster v. Gage*, 280 U. S. 327, as to the date of acquisition, and according to the laws of Massachusetts, the securities had been held by the trustees for more than two years and the gain was, therefore, a capital gain and should have been taxed as such under Sec. 101 (a) of the Act of 1928. The government, however, contends that Congress has a right to determine what shall be considered capital assets and the basis for determining gains and losses; and that, inasmuch as the basis for determining the gain or loss in case of a sale of personal property acquired under a residuary bequest is fixed in Sec. 113 (a) (5) of the same Act as the value at the time of distribution, Congress must have intended that in such case the date from which the two year period is to be computed is also the date of distribution. The government also contends, since the provisions of Sec. 101 (c) (8) B provide that, in determining the period during which a taxpayer has held property, there shall also be included the period for which such property has been held by any other person, provided that under the provisions of Sec. 113 such property has for the purpose of determining gain or loss the same basis, in whole or in part, in the hands of the taxpayer as it would have had in the hands of such other person, that the period during which these securities were held by the executor cannot be added to the time in which they were held by the trustees; since the basis for computing the gain, if sold by an executor, is the value at death of the testator, while in the case of the residuary legatee it is the date of distribution.

It should be noted, however, that the reference

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in Sec. 101 (C) (8) B is not alone to para. (a) (5) of Sec. 113, but to the entire section, which contains other instances of the arbitrary fixing of the base value for determining gains and losses. This contention of the government is evidently based on the theory that a legatee acquires title from the executor, but since a legatee, whether special or residuary, does not acquire his title from the executor, but under the will, *Brewster v. Gage, supra; Chandler v. Field,* 63 Fed. (2d) 13, 15, certiorari denied, 289 U. S. 758; *Davis v. Newton,* 6 Met. 537, 541; *Hooper et al. v. Bradford,* 178 Mass. 95, 97, Sec. 101 (c) (8) B has no application to this case. Personal property transmitted at death is not held by the representatives of the estate within the meaning of Sec. 101 (c) (8) B. The executor or administrator can only be said to hold it for the limited purpose of administration, or, as has been said, in *autre droit,* or as a *quasi* trustee for the benefit of the legatees, or heirs. *Lathrop v. Merrill,* 207 Mass. 6, 10.

In *Brewster v. Gage, supra,* the court said, p. 334:

> 'Immediately upon the death of the owner there vests in each of them (referring to a legatee or heir) the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution * * *. Upon acceptance of the trust, there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for

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> distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death.'

It is clear that acquisition as used in these Acts means acquisition of title and not of possession.

As the Committee on Ways and Means pointed out in its report to the House No. 704 on the Revenue Act of 1934, with respect to the change in Sec. 113 (a) (5) of the pending bill from that of the Act of 1928:

> 'The change in the 1928 Act was made because there was some doubt as to the meaning of the term "acquisition," which was the term used in the Act of 1926. Since the 1928 Act was passed, the Supreme Court has defined the "date of acquisition" to mean the date of death in the case of all property passing by bequest, devise or inheritance, whether real or personal. (*Brewster v. Gage,* 280 U. S. 327). Sec. 113 (a) (5) of the bill conforms to the language contained in the Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal.'

In the 1921 Act, Sec. 206 (a) (6), it was provided that to constitute capital assets, property must be 'acquired and held' for two years. In subsequent Acts the word 'acquired' has been omitted, the obvious reason is that the word 'acquired' was

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surplusage, since, in general, property is held from the time it is acquired or one's ownership begins.

A comparison of corresponding sections in prior Acts: Sec. 206 (a) (6), and 202 (a) (3) of the 1921 Act; Secs. 208 (a) (8) and 204 (a) (5) of the 1924 Act; Secs. 208 (a) (8) and 204 (a) (5) of the 1926 Act, discloses that capital assets are determined by the time property is 'held', while gains and losses are computed from the value as a base at the time of acquisition, except in certain instances of an arbitrary fixing of the base value. It was not until the insertion of Sec. 113 (a) (5) in the 1928 Act that any change was made in the base for computing gains between personal property transmitted at death by special bequest and by residuary bequests.

It is significant, however, that even in para. (a) (5) of Sec. 113 of the 1928 Act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides, that 'If personal property is acquired by specific bequest,' etc., and 'in all other cases, if the property was *acquired either by will or intestacy.*' (Italics supplied).

Sec. 101 and Sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.

In other words, Congress intended only by the

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change in Sec. 113 (a) (5) of the 1928 Act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the Administrative Bureau as to date of acquisition of such property. It, however, made no substantial change in Sec. 101 of that Act from the provisions of Sec. 208 (a) (8) of the 1926 Act for determining what are capital assets.

In view of the purpose, which has repeatedly been recognized both by the Administrative Bureau and the courts of allowing a gain from the sale of property held for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the Revenue Acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the government in construing Sec. 113 (a) (5) of the 1928 Act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for computing gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by Sec. 113 (a) (5) of the Act of 1928 to effect a change in the period during which the property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in Sec. 101 of that Act.

There is nothing new in fixing an arbitrary date for determining the base value for computing gain

First National v. U. S. continued.

or loss in the sale of property and different from that when the property was acquired by the taxpayer. In case of property purchased prior to 1913, it was fixed as of March 1, 1913, unless the cost price was in excess of their value on that date; also see Sec. 208 (a) (8) of the 1926 Act, and see Sec. 113 (a) (1) (2) (3) (4) (6) of the 1928 Act.

We find nothing in the decisions in *Helvering v. New York Trust Co.*, 292 U. S 455, or *Helvering v. Bliss*, 293 U. S. 144, which modifies the rule laid down by the Supreme Court in *Brewster v. Gage, supra*, in construing the sections of the earlier Acts corresponding to Sec. 113 (a) (5). Under the rule laid down in *Brewster v. Gage, supra*, we think the petitioners acquired the *corpus* of the trust on April 4, 1926, and therefore held it more than two years prior to the sale, and that the District Court erred in holding that under the provisions of Sec. 101 (c) (8) B of the 1928 Act, the taxpayer had not held the securities sold since the death of the testator.

The gain of $74,773.08 resulting from the sale of securities by the trustees, therefore, should have been treated as a capital gain, and in order to determine the total amount to which the petitioners are entitled as a refund, the case must be remanded for a recomputation of the tax in accordance with this opinion.

The Judgment of the District Court is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion."

Under the construction thus placed upon the Act of 1928, in the above opinion, petitioner's gain would be computed on the basis of time of distribution as already determined by the Commissioner and her holding period

for capital gain determination would begin from date of decedent's death.

We have nothing further to add to the sound reasoning of the First Circuit Court in *First National Bank v. United States, supra,* which they advanced to support their construction of the relevant sections of the Revenue Act of 1928 that under authority of *Brewster v. Gage, supra, the* legatee or distributee does not acquire title from the executor or administrator, but under the will or under the intestate laws, and his title vests as of the date of decedent's death; that acquisition as used in these Acts means acquisition of title and not of possession; that Sections 101 and 113 were enacted for entirely different purposes, the first defining capital assets and capital gains, and the second defining the method of determining the amount of the gains, whether capital gains or ordinary net income, and that these sections are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer; that since the acquisition of the securities sold dates back to the death of decedent they were held more than two years and should be so treated in assessing the tax as a capital gain although the amount of the gain was properly determined under Section 113 (a) (5).

Nothing has been said by the Second or the Ninth Circuit Court or the Board of Tax Appeals which can be used to refute the sound reasoning and conclusions of the First Circuit Court, and we submit it is plainly evident that the decision of the Third Circuit Court of Appeals in the case at bar is against the weight of authority and in conflict with the applicable decisions of other Circuit Courts and of the Supreme Court of the United States.

We have advanced to the Respondent, without success, the equitable theory that the Estate of T. H. Given was in the process of administration from 1919 until 1925, when an account was filed and the audit thereon established that all the debts had been paid, except a disputed balance of the Pennsylvania inheritance tax, funds for which were on hand; that the parties in interest had elected to take in kind and had agreed to suspend distribution of a portion of the assets; that after the decree of distribution of May 20, 1925, the duties of the executors having been fulfilled, they became custodians of the assets which had been constructively distributed; that by the election to take in kind, petitioner's assets were earmarked and the executors as custodians were legally bound to account to her for them specifically.

In view of these facts and the additional strength of her position as the owner of a gift in 1924 of a vested interest, the value of which was recognized and taxed, we contend that petitioner's position is much stronger than that of a residuary legatee or beneficiary of an estate. She is clearly within the intention of Congress in the class of taxpayers, who having held property for a considerable period were to be taxed on their gain at a lower rate.

The Revenue Act of 1928 lays a tax on ordinary income and also lays an optional tax on capital net gain. Both taxes are a burden on a citizen and in seeking the proper construction of the tax on capital net gain, the taxpayer certainly is not seeking an exemption or a privilege, but asks for a construction of a section of the statute which will impose on her the lesser burden and she is entitled to the benefits of the principle of construction that taxing laws in case of ambiguity must be construed in favor of the taxpayer.

In *Gould v. Gould,* 245 U. S. 151, Mr. Justice McReynolds, delivering the opinion, says:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen."

The Revenue Act of 1928 should be construed in the broad comprehensive manner outlined in the *First National Bank of Boston v. United States, supra,* and we concur in what this Honorable Court has already said in *Helvering v. Bliss,* 293 U. S. 144, Mr. Justice Roberts delivering the opinion:

> "The exemption of income devoted to charity and *the reduction of the rate of tax on capital gains* were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy and are not to be narrowly construed." (Italics are ours).

Conclusion.

From the foregoing, we submit that the weight of authority supports our specifications that the Circuit Court of Appeals for the Third Circuit erred in affirming the Board of Tax Appeals' decision that the date which governs for gain or loss purposes must be used in fixing the date of acquisition for capital gain determination; that petitioner had not held the stock sold for more than two years from the date of distribution; that the stock was therefore not a capital asset and that the profit realized by her from the sale thereof was "ordinary net income", and the said Court further erred

in affirming the decision that the petitioner was therefore liable for an additional income tax of $35,312.53 for the year 1929.

Therefore your petitioner prays that the judgment of the Circuit Court of Appeals for the Third Circuit and the finding, decision and order of the Board of Tax Appeals in this cause be reversed and set aside and that this case be remanded for further proceedings consistent with the opinion of this Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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APPENDIX.

Sections of Statutes Involved.

REVENUE ACT OF 1928

45 STAT. 791-811.

SEC. 101. CAPITAL NET GAINS AND LOSSES.

C. Definitions.—For the purposes of this title—

* * * * * * * *

(c) (8) "Capital Assets" means property held by the taxpayer for more than two years * * * For the purposes of this definition—

* * * * * * * *

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

* * * * * * * *

45 STAT. 791-818.

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * *

(2) Gift after December 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of

the donor or the last preceding owner by whom it was not acquired by gift. * * *

(5) Property transmitted at death—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

* * * * * * * *

SEC. 168. CAPITAL NET GAINS AND LOSSES.

In the case of an estate or trust, or of a beneficiary of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the estate or trust, and shall be taxed to the beneficiary or to the estate or trust as provided in this Supplement, but at the rates and in the manner provided in section 101 (a) and (b), relating to capital net gains and losses.

REVENUE ACT OF 1926.

44 STAT. 9-19.

CAPITAL GAINS AND LOSSES.

SEC. 208 (a) For the purposes of this title—

* * * * * * * *

(8) The term "capital assets" means property held by the taxpayer for more than two years * * * In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 such property has for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person. * * *

* * * * * * * *

(e) In the case of the members of a partnership, of an estate or trust, or of the beneficiary of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) or (c) of this section.

REVENUE ACT OF 1926.

44 STAT. 9-14.

BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

SEC. 204 (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * *

(2) If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * *

* * * * * * * * *

(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition.

* * *

REVENUE ACT OF 1924.

43 STAT. 253-262.

SECTION 208 (a) For the purposes of this title

* * * * * * *

(a) (8) The term "capital assets" means property held by the taxpayer for more than two years.

* * * * * * * *

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by Sections 210 and 211 of this title a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the man-

ner provided in Sections 210 and 211, and the total tax shall be this amount plus 12½ per cent of the capital net gain.

(c) In the case of the members of a partnership of an estate or trust, or of the beneficiary of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in Sections 218 and 219, but at the rates and in the manner provided in subdivision (b) and (c) of this section.

REVENUE ACT OF 1921.

42 STAT. 227-232.

SECTION 206 (a) That for the purpose of this title:

* * * * * * *

(a) (6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years. * * *

42 STAT. 227-229.

Section 202 (a) That the basis for ascertaining the gain or loss sustained from the sale or other disposition of property real, personal or mixed, acquired after February 28, 1913, shall be the cost of such property, except that * * *

* * * * * * *

(3) In the case of such property, acquired by bequest, devise or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition.

REPORT NO. 960.

Report No. 960 of the Senate Committee on Finance on the Internal Revenue Bill of 1928, at page 26, contains the following:

The decision by the Court of Claims in *McKinney v. United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and there-

fore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

REPORT NO. 1882.

Report No. 1882 of the Conference Committee, on the Revenue Bill of 1928, page 14, contains the following:

Section 113 (a) (5) is amended (No. 75) so as to provide that in the case of specific bequest of personalty or a general or specific devise of realty or the transmission of realty by intestacy the basis shall be the fair market value of the property at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor pur-

chases property and distributes it to the beneficiary; and the House recedes, with the following amendment:

A special rule is provided in section 113 (a) (5) by which to determine the basis of property transferred in trust with the right reserved to the grantor at all times prior to his death to revoke the trust where the sale or other disposition of property occurs after the death of the grantor. This rule includes sales or other dispositions by the trustees and also by a beneficiary of the trust. In view of the complete right of revocation in such cases on the part of the grantor at all times between the date of creation of the trust and his death, it is proper to view the property for all practical purposes as belonging to the grantor rather than the beneficiaries and to treat the property as vesting in the beneficiaries according to the terms of the trust instrument, not at the date of creation of the trust, but rather on the date of the grantor's death, for the purpose of determining gain or loss on sale or other disposition of the property after the grantor's death by the trustee or by a beneficiary. Accordingly, it is provided that the basis of such property in the hands of the persons entitled thereto by the terms of the trust instrument after the grantor's death shall be the same as if the trust instrument had been a will executed on the date of his death. Thus property acquired by virtue of revocable trusts of the kind described is treated, for all practical purposes, the same as though it had been transmitted by the grantor by will at his death.

Cf. Report No. 558, Senate Committee on Finance, Revenue Bill of 1934, p. 34;

Report No. 74, House Committee on Ways and Means, Revenue Bill of 1934, p. 28;

Report of the Joint Committee on Internal Revenue

Taxation, dated November 15, 1927, pp. 10, 17 and 40, *et seq.*;
Section 113 (2) (5), Revenue Act of 1934, 48 Stat. 706.

REPORT OF SENATE COMMITTEE—1934 BILL.

Report of Senate Committee on Finance on 1934 Revenue Bill contains the following:

Section 113 (a) (5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to the meaning of the term "date of acquisition," which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster v. Gage,* 280 U. S. 327). Section 113 (a) (5) of the House bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal. The only change made by your committee to this paragraph of the House bill is to make it clear that if the property of the decedent is sold by the executor or other representative of the estate of the decedent, the basis for computing gain or loss from such sale is the fair market value at the date of death, which is the same basis adopted under the House bill when the property is sold by the beneficiary. The section also includes a provision relating to general powers of appointment exercised by will, which was explained in connection with section 113 (a) (4).

REPORT NO. 52 OF THE SENATE COMMITTEE.

Report No. 52 of the Senate Committee on Finance on the Internal Revenue Bill of 1926 contains the following at page 18:

Section 208 (a) (8): The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years. Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact the question frequently arises as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The House bill incorporates in the law the present regulation of the Treasury and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gain and loss under this section. The same question arises in the case of property received by gift after December 31, 1920. The House bill provides that the period for which the property was held by the donor shall be added to the period for which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section.

The committee recommends a further provision that in determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under section 203 (c) of this bill or the revenue act of 1924 there shall be included the period for which he held the stock or securities in the distributing corporation. Inasmuch as section 203 (c) in this bill and in the revenue act of

1924 is broad enough to include the case of stock dividends, the committee amendment takes care of the determination of the two-year period in the case of stock dividends, as to which the present Treasury regulations apply the same rule.

REPORT NO. 356, CONFERENCE COMMITTEE.

Report No. 356, the Conference Report on the Revenue Bill of 1926, at page 32, contains the following:

Amendment No. 10: The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years. This amendment provides that in determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under section 203 (c) of this bill or the revenue act of 1924, there shall be included the period for which he held the stock or security in the distributing corporation. Inasmuch as section 203 (c) in this bill and in the revenue act of 1924 is broad enough to include the case of stock dividends, this amendment takes care of the determination of the two-year period in the case of stock dividends as to which the present Treasury regulations apply the same rule; and the House recedes.

FILED

No. [illegible] 24

In the Supreme Court of the United States

OCTOBER TERM, 1934

MABOR K. McPEEK, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 876

NANCY K. McFEELY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case.

The petitioner became the owner of 1,000 shares of Radio A common stock which she acquired as the result of a gift from her mother, Martha A. Given. Mrs. Given's husband, T. H. Given, died in 1919, and no provision having been made in his will for her, she elected to take one-half of his estate, pursuant to the law of Pennsylvania, in lieu of dower. In 1924 she made an assignment in trust for the petitioner of ten percent of her undistributed one-

half interest in her husband's estate, and in 1925 this gift was made absolute. In 1925, the executors of T. H. Given filed a partial account in the Orphans' Court and a partial distribution of the assets was decreed, under the terms of which the petitioner received certain stocks in trust which are of no immediate concern. On November 3, 1927, following a further decree of distribution, the petitioner received directly from the executors 1,000 shares of Radio A common stock. On March 14, 1929, the petitioner sold this latter stock, which had been valued for gift-tax purposes as of June 23, 1924, at $20,625, for $484,460, reporting a net gain of $463,835 in her return for 1929. In determining petitioner's tax liability for 1929, the Commissioner took the value of Radio stock as of November 3, 1927, the date of distribution, as the basis for computing gain, and showed a resulting gain of $404,085 instead of $463,835. The petitioner did not question the Commissioner's valuation of the stock.

The sale was less than two years from the time of the distribution and delivery of the stock to the taxpayer, and the Commissioner held this date, November 3, 1927, controlling in his determination that the profit did not fall within the capital net gain provision of Section 101 (a) of the Revenue Act of 1928 (*infra*, p. 6) and constituted ordinary net income. His position was upheld by the Board of Tax Appeals and the Circuit Court of Appeals.

While we think the conclusion reached by the court below is correct, we do not feel warranted in opposing the petition. The petitioner urges that the decision is in conflict with the decisions of the Circuit Court of Appeals for the First Circuit in *The First National Bank of Boston* v. *United States* and *Lee* v. *Commissioner,* both decided March 9, 1935, and not yet reported but found in C. C. H., 1935, Vol. 3, pars. 9214 and 9215, respectively. The Government intends to apply to this Court for writs of certiorari in those cases. The court there decided that a residuary legatee receiving personal property upon distribution of a decedent's estate should be deemed to have held such property from the date of the decedent's death for the purpose of determining the holding period under the provisions of Section 101 (c) (8) of the Revenue Act of 1928 (*infra,* p. 6).

It will be noted that in those cases the taxpayers were legatees, whereas here the taxpayer is the donee of the widow who took against the will, and some distinction may be made on this basis. The court below stated that "no precedent or principle is involved" and limited its opinion to an approval of the Board's action. But the broad principle presented in this case, as well as in those cases decided by the Circuit Court of Appeals for the First Circuit, is whether personal property of a decedent passing otherwise than by specific bequest may be considered to have been held by the

recipient under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*, during any period prior to actual distribution. Here the petitioner to succeed must either show that she should be deemed to have held the stock in question from the date of the gift rather than the date of distribution; or, upon the theory that she received title through her donor and is entitled to include the donor's holding period under Section 101 (c) (8)(B) of the Act, *infra*, she must show that the donor held the property from the date of the decedent's death. So viewed, the decision denying the use of the capital gain rate conflicts in principle with the decisions of the First Circuit in the cases of *The First National Bank of Boston* v. *United States*, and *Lee* v. *Commissioner*, *supra*. The broad question presented is one of considerable importance. In *Dibblee* v. *Commissioner*, 75 F. (2d) 617, the Circuit Court of Appeals for the Ninth Circuit decided the question contrary to the decisions in the First Circuit cases, *supra*, but that case is now pending on the taxpayer's petition for rehearing. The question is also involved in cases now pending on petition for review in the Circuit Courts of Appeals for the Second[1] and the Eighth Circuits.

As heretofore stated, the Government intends to apply to this Court for writs of certiorari to the First Circuit in the cases of *The First National Bank of Boston* v. *United States*, and *Lee* v. *Commissioner*, *supra*, and therefore does not oppose

[1]The case pending in the Second Circuit, Ogle v. Commissioner, was decided by that court on May 6, 1935, in favor of the Government. That court in its opinion recognizes a conflict betw

this petition. It respectfully requests that this Court withhold action upon the petition in this case until petitions in those cases may be prepared and filed.

Respectfully submitted.

STANLEY REED,
Solicitor General.

MAY 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 311, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

* * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the

close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

* * * * *

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(2) *Gift after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * *

* * * * *

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the

basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 24

NANCY K. McFEELY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 16–29) is reported in 29 B. T. A. 998. The *per curiam* opinion of the Circuit Court of Appeals (R. 56) is reported in 74 F. (2d) 1017.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 10, 1934. (R. 57.) A petition for rehearing filed January 4, 1935 (R. 58–63), was denied January 18, 1935 (R. 64). The peti-

tion for a writ of certiorari was granted May 20, 1935. (R. 65.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner on December 19, 1929, sold stock which she had received, pursuant to a gift from her mother in August, 1925, of 10 percent of the latter's statutory one-half interest in the estate of her deceased husband, upon a distribution of the estate on November 3, 1927. The decedent, the original owner of the stock, died on June 28, 1919. Was the stock "held" by the petitioner for more than two years, so that the gain on the sale thereof is taxable as a "capital net gain" within the meaning of Section 101, Revenue Act of 1928?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*, pp. 36–42.

STATEMENT

The facts were stipulated (R. 34–38) and may be summarized as follows:

The petitioner is the daughter of Martha A. Given, who is the widow of T. H. Given, deceased. T. H. Given died testate on June 28, 1919, leaving his widow and no issue. The will of the decedent, filed and probated in Allegheny County, Pennsylvania, on July 3, 1919, made no provision for his widow. On July 3, 1919, the executors of the es-

tate duly qualified and the widow filed with the executors her written election under the laws of Pennsylvania to take against the will one-half of the decedent's estate in lieu of dower. One-half of the estate was duly awarded to the widow by the Orphans' Court of Allegheny County, under the laws of Pennsylvania. Audit of the first partial account of the executors, filed in July, 1923, was continued, as all debts of the estate were not paid and the estate was not fully administered. (R. 34–35.)

In June, 1924, Mrs. Given assigned 10 percent of her one-half interest in the decedent's estate in trust for Mrs. Nancy K. McFeely, the petitioner, and on March 16, 1925, Mrs. Given reported the gift and paid the gift tax thereon. (R. 35.)

Pursuant to an order of the Orphans' Court dated May 20, 1925, entered upon audit of the second partial account of the executors filed March 6, 1925, the trustee of Nancy McFeely, the petitioner, received 900 shares of American Window Glass Machine Company common stock on a partial distribution of the estate, the parties in interest having elected to accept distribution in kind. The remaining assets of the estate were held by the executors pending settlement of a state tax claim and further distribution was suspended until the filing of a final account. (R. 35–36.)

On August 1, 1925, the gift by Mrs. Given of 10 percent of her interest in the estate in trust for Nancy McFeely was made absolute by duly exe-

cuted instruments, the validity of which was thereafter recognized by the Orphans' Court. (R. 36.)

Upon a further distribution of assets of the decedent's estate ordered November 3, 1927, the petitioner received, among other assets, 1,000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Company common stock. On March 14, 1929, the petitioner sold the Radio stock for $484,460, such stock having been valued at $20,625 as of June 23, 1924, for purposes of the gift tax paid by Mrs. Given in 1925 on the gift of ten percent of her interest in the estate to her daughter. On December 19, 1929, the petitioner sold the 1,050 shares of Window Glass Machine Company stock for $19,950, such stock having been valued at $89,100 for gift tax purposes, showing a net loss of $69,150. (R. 37.)

On her 1929 income tax return, filed in March, 1930, the petitioner reported as "capital net gain" a net profit of $394,685 from the sale of the 1,000 shares of Radio stock and the 1,050 shares of American Window Glass Machine Company stock, based upon the value thereof as of June 23, 1924, on the assumption that the stock was acquired by her on the date of the gift by her mother to her. (R. 37.)

The Commissioner, respondent, determined that there was a capital net loss of $64,223.25, instead of $69,150, on the sale of the American Window Glass Machine Company stock, based upon the value thereof at the date such stock was distributed

to the taxpayer, 900 shares on May 20, 1925, and 150 shares on November 3, 1927. The Commissioner further determined that there was "an ordinary profit" of $404,085 on the sale of the Radio stock, instead of a "capital net gain" of $463,835 as claimed by the petitioner, based upon the value thereof at the date of distribution to the petitioner, November 3, 1927. The Commissioner thereupon asserted a deficiency in tax for 1929 of $35,372.53, arising principally from the determination of an "ordinary net profit" rather than "a capital net gain" on the sale of the Radio stock. (R. 38.)

The Board of Tax Appeals sustained the determination of the Commissioner (R. 29) and the Circuit Court of Appeals, upon the petitioner's petition for review, affirmed the Board of Tax Appeals (R. 56–57). The only issue raised in the court below and in this Court is whether the profit on the sale of Radio stock is ordinary net income or a capital net gain. (R. 30–33; Pet. 10–11.)

SUMMARY OF ARGUMENT

Section 101 (c) (8) of the Revenue Act of 1928, *infra*, defines the term "capital assets" as "property held by the taxpayer for more than two years," with certain exceptions which are not here material.

In this case the petitioner actually held the stock which she sold in March, 1929, from the time it was distributed to her. She received the stock through her mother by intestacy upon distribution

of assets of the decedent's estate on November 3, 1927. Hence if the word "held" is given its ordinary meaning in Section 101 (c) (8), and is construed independently of related sections in the statute (as the petitioner claims it should), the stock which the petitioner sold had not been held for more than two years at the time of sale and the gain arising from the sale may not be taxed as a capital net gain under Section 101. But we do not agree that Section 101 should be construed independently. This Court has held that the corresponding section of an earlier statute must be construed in conjunction with the section prescribing the basis for determining gain or loss and where the vendor of property acquired property by gift and was required to use the donor's basis for measuring gain, that he should be treated as having held the property during the donor's tenure for the purpose of the capital net gain provision.

It was held by this Court that the date established as fixing the basis for computing the gain is likewise the date which marks the beginning of the holding period in ascertaining the rate of tax to be applied to the gain. Under Section 113 (a) (5) of the Revenue Act of 1928, *infra*, the petitioner is required to use as a basis for measuring gain the fair market value of the property at the time of distribution, whereas her predecessor in title (for purposes of this case, the estate) was required to

use the fair market value at the time of death. Inasmuch as the petitioner is not treated as having held the property for the time that the estate held it for the purpose of measuring the gain, she should not be treated as having held it for the period of the estate's tenure for the purpose of fixing the rate of tax applicable to that gain. The date of distribution being established as fixing the basis for computing the gain on the sale, the same date must be used to fix the holding period in ascertaining the applicable rate of tax.

This conclusion is supported by Section 101 (c) (8) (B), which specifically provides that where the successor is required to use the predecessor's basis, the tenure of the predecessor shall be included in determining whether the successor has held the property for two years. The inference is clear that if the successor is not required to use the predecessor's base, he may not add his tenure.

Decisions construing the word "acquire" and "time of acquisition" under other statutes do not aid the petitioner's case. Congress had the power to say that the basis for measuring gain from the sale of personal property (other than that received by specific bequest) should be the fair market value of the property at the time of distribution, that for income tax purposes the property will be deemed acquired in cases of this kind when distributed, regardless of local rules of property. It has said so in Section 113 (a) (5) of the statute here in-

volved and that provision must be given effect in the definition of "capital assets" in construing Section 101 (c) (8).

The decision of the Circuit Court of Appeals is correct.

ARGUMENT

PETITIONER HAVING RECEIVED STOCK BY GIFT FROM HER MOTHER, WHO ACQUIRED THE SAME BY INTESTACY, SUCH STOCK WAS HELD ONLY FROM THE DATE OF DISTRIBUTION, LESS THAN TWO YEARS FROM THE SALE THEREOF, AND THE GAIN THEREFORE IS NOT A CAPITAL NET GAIN

The Circuit Court of Appeals, affirming the Board of Tax Appeals *per curiam,* held in effect that the 1,000 shares of Radio stock sold in March, 1929, were held by the petitioner, within the meaning of the statute, only from the date of distribution thereof by the executors of the decedent's estate, November 3, 1927, a period less than two years, and accordingly the profit thereon may not be taxed as a "capital net gain" but is taxable as ordinary net income. We submit that the decision below is correct.

The petitioner contends that since under the laws of Pennsylvania the interest of her mother in the estate vested at the date of decedent's death, June, 1919, and the stock in question was acquired by gift from her mother, such stock was held by the taxpayer under the statute (Sections 101 (c) (8) (B) and 113 (a) (2), *infra*) from 1919. (Br. 22.) The petitioner further contends that the stock was held by her in any event from the date of the gift from

her mother. (Br. 46.) Hence, it is argued that in either case the stock was held for more than two years and the profit on the sale thereof is taxable as capital net gain under the statute. The Commissioner contends that since the petitioner's mother under the Revenue Act of 1928 could not have acquired the stock, for income tax purposes, prior to distribution of the same by the estate of the decedent on November 3, 1927, the petitioner did not acquire such stock pursuant to the gift from her mother until that date, so that the stock was held by the petitioner for less than two years at the time of sale and the profit realized is not taxable as capital net gain, but is ordinary net income taxable at the usual rates.

Section 101 (c) (8) of the Revenue Act of 1928, *infra,* provides that at the election of the taxpayer the tax on net gains from the sale of capital assets may be taxed at 12½ percent (instead of at the ordinary normal and surtax rates) and defines the term "capital assets" as "property *held by the taxpayer* for more than two years." (Italics supplied.) It is further provided that in determining the period for which the taxpayer has held property there shall be included the period for which the property was held by any other person if under Section 113 the basis for determining gain or loss on a sale of the property in the hands of the taxpayer is the same as it would have been in the hands of such other person. (Subdivision (c) (8) (B),

infra). Section 113 (a) of the Revenue Act of 1928, *infra*, so far as material here, provides that the basis for determining gain or loss on a sale of property *acquired* after February 28, 1913, shall be the cost thereof, with certain exceptions. Subdivision (a) (2) provides generally that if the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor. Under Subdivision (a) (5) the basis prescribed for real property acquired by general or specific devise or intestacy, and of personal property acquired by an estate from the decedent, is the value thereof at the date of decedent's death. In all other cases of property acquired either by will or intestacy, however, which include general or residuary bequests, the basis specified is the value of the property *at the time of the distribution to the taxpayer.*

The stock here in question was received by the petitioner pursuant to a gift from her mother on August 1, 1925,[1] of 10 percent of the latter's interest in her deceased husband's estate. The mother, however, had only a one-half interest in the de-

[1] While the petitioner's mother originally transferred 10 per cent of her interest in the decedent's estate on June 23, 1924, in trust for the benefit of the petitioner, the trust was cancelled and the gift was made absolute on August 1, 1925. If the date of gift is determinative, it is immaterial upon which of these dates the gift is considered as made. Accordingly, the date the gift was made absolute will be referred to herein as the date of the gift. In our view, however, the date of gift is not controlling or even material here.

cedent's estate, which she took, by virtue of her election, under the laws of Pennsylvania and against the will, no provision for her having been made by the decedent in his will. Accordingly, the mother's interest in the estate came to her and was acquired by intestacy (*Shestack's Estate,* 267 Pa. 115; *Evans's Estate,* 150 Pa. 212, 218; *Greiner's Appeal,* 103 Pa. 89; Bouvier's Law Dictionary (Rawle's 3d Ed.), Vol. 1, p. 1679; Black's Law Dictionary (3d Ed.), p. 1003) and the basis for gain or loss of personal property so acquired by the mother would be the value thereof at the date of distribution. (Section 113 (a) (5), *infra.*) The stock here in question was personal property and in the hands of the mother the basis is the value thereof on November 3, 1927, the date of distribution. The stock having been acquired by the petitioner by gift the basis in her hands also is the value at the date of distribution. (Section 113 (a) (2), *infra.*) If, as the petitioner contends, the stock was acquired and held by her at the time of the gift although not then received, the two year period of the statute would be satisfied without regard to the holding period of the mother. But obviously the petitioner did not acquire and hold this stock prior to the date it was acquired and held by her mother, from whom she received it by gift. If, as we contend, this stock was not acquired and held for income tax purposes, within the meaning of the Revenue Act of 1928, by the mother until the date of

distribution, because she acquired the same by intestacy, it follows that the petitioner did not acquire and hold the stock until that date. The gift made in 1925 was of a portion of an inchoate and indeterminate interest and not of the Radio stock or any other specific property; indeed, at that time the mother had no specific property to give. Hence, it is immaterial that the gift of the undetermined interest was made more than two years prior to the sale of the Radio stock, for the gift could not be effective as to such stock until it was acquired by the mother, the donor. The petitioner stands in no better position than her mother or than if she had acquired the stock by intestacy rather than by gift. The result in this case is the same if the petitioner in fact acquired the property by intestacy directly from the decedent's estate rather than by gift from her mother, who acquired the same by intestacy, and accordingly, for the purpose of this discussion the gift may be ignored.

The stock in question was acquired by the petitioner through her mother by intestacy and was distributed to her on November 3, 1927, under a decree of distribution. The stock was sold on March 14, 1929. It seems clear that if the word "held" is used in its literal and obvious sense in Section 101 (c)(8) and if that section is to be construed independently of related sections of the statute, the stock in this case was "held" by the petitioner considerably less than two years before

its sale. One cannot be said to hold property until it has been received or is in his grasp. As commonly understood to hold something, specific property, implies the ability or capacity to turn it loose. The petitioner could not prior to November 3, 1927, the date of distribution, turn loose the Radio stock for she did not have it and could not know that she would have it until that date. Hence, we suggest that if the petitioner's contention, that Section 101 is a wholly independent provision, were correct, we believe the Court would be bound to conclude that the stock was not a capital asset as defined in Section 101. A word is to be given its generally accepted meaning in the construction of a statute. *New Colonial Co.* v. *Helvering*, 292 U. S. 435. Construed independently of the provisions relating to a determination of gain or loss, there would be no reason to construe the word "held" as being used in anything other than its ordinary sense of being possessed. See definition of "hold" in Webster's New International Dictionary. In *Rufus R. Rand, Jr.* v. *Commissioner* (C. C. A. 8th), decided August 13, 1935, not yet reported but may be found in C. C. H., 1935, Vol. 3–A, p. 10, 351, it was said (p. 10,355):

> While we are convinced that section 101 should be construed in the light of section 113, yet the result would be the same if section 101 were alone considered for then the language there used would govern and that language clearly limits "held" to the period

after distribution (*Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 463, 464, 465).

We do not agree, however, that Section 101 (c) (8) may be construed independently. We submit that it must be construed in conjunction with Section 113 (a) (5) of the same Act, which provides that the basis for measuring gain or loss of personal property acquired by will or intestacy in all cases, other than specific bequests, shall be the value thereof at the time of distribution of such property to the taxpayer. The petitioner concedes that for the purpose of determining the amount of gain on the sale, the basis is the value of the stock at the time of distribution (Br. 57), but she contends that the establishment of such basis has no relation to the time of acquisition and the period of holding such property. The argument is that since under the earlier Revenue Acts fixing value at the date of acquisition as the basis for property acquired from a decedent such property was held to have been acquired at the date of death (*Brewster* v. *Gage*, 280 U. S. 327) and such property was deemed held from that date, within the definition of "capital assets," the meaning of "capital assets" remains the same under the Revenue Act of 1928, because the definition of that term was reenacted without change. Such a contention is wholly without merit. "Capital assets" are defined in the earlier Acts, as well as the 1928 Act, as "property held for more than two years," but the statute does

not undertake to define the word "held" or fix independently in the definition of "capital assets" the date from which property is held. Under the earlier statutes confusion arose as to the meaning of the general language, "date of acquisition," employed in fixing the basis of property acquired from a decedent by general and residuary legatees. It was to settle this confusion that Congress in the 1928 Act, adopted prior to the decision in *Brewster* v. *Gage, supra,* specifically fixed, without regard for technical rules as to the vesting of title, the dates of acquisition for income tax purposes of property acquired from a decedent in various ways. Section 113 (a) (5), *infra,* in fixing the date of distribution as the basis of property acquired from a decedent by will, other than specific bequests, and by intestacy, plainly establishes that date as the time of acquisition of the property for income tax purposes. (See S. Rep. No. 960, 70th Cong., 1st Sess., p. 26, *infra.*) Clearly it was within the power of Congress to fix the date of acquisition of property for income-tax purposes, regardless of local rules of property. *Taft* v. *Bowers,* 278 U. S. 470; *Burnet* v. *Harmel,* 287 U. S. 103; *Dibblee* v. *Commissioner,* 75 F. (2d) 617 (C. C. A. 9th), petition for rehearing denied September 6, 1935. See also, *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110; *Weiss* v. *Wiener,* 279 U. S. 333. Hence it is immaterial when the property in cases of this kind may be considered under local law to have vested in the tax-

payer. *Brewster* v. *Gage, supra,* plainly recognized the subject as one controlled by the Federal revenue laws. The statute having prescribed what shall be deemed the date of acquisition of personal property by a residuary or general legatee or by intestacy for determining the amount of gain taxable, we submit the date of acquisition remains the same in determining the period such property is held and the rate of tax applicable to the gain realized. In any case it seems plain that Congress, in establishing the date of distribution for valuation as the basis for determining the gain on a sale of personal property acquired by intestacy, certainly intended that the same date should measure the period such property was held by the taxpayer as determinative of the rate of tax to be applied to the gain. Under the statutes prior to the 1928 Act the date established for the basis of such property also fixed the holding period of such property, and when Congress changed the date for basis without altering the general definition of "capital assets" to establish independently the beginning of the holding period, it must have intended that the date for both purposes should continue to be the same under the 1928 Act as it was under the prior statutes. Accordingly, Sections 101 (c) (8) and 113 (a) (5), being included in the same Act and applicable to different elements of the same or like transactions, must be read together in determining the date the petitioner acquired the stock in ques-

tion and the period such stock was held by the petitioner.

This view is directly supported by *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, affirming 68 F. (2d) 19 (C. C. A. 2d), where it was held that the section of the 1921 Act prescribing the basis of property acquired by gift must be construed with the section of the same Act defining a capital gain, and that since under the Act the donee was required to use as his basis the basis of the donor, he should be considered for capital gain purposes as having "held" the property for the period it was held by the donor. In that connection this Court said (p. 467):

> Sections 202 (a)(2) and 206 (a)(6) are included in the same Act and are applicable respectively to different elements of the same or like transactions and *are not to be regarded as wholly unrelated.* (Italics supplied.)

In the same connection the Circuit Court of Appeals in that case said (p. 20):

> The upshot of the two sections, read as the Board reads them, is to treat the donee, for the purpose of computing his income, as holding the property during the period of the donor's tenure; but for the purpose of finding the rate at which that very income is to be taxed, as holding it only from the time when he gets it. The periods are tacked to establish his "capital assets", and divorced to tax them; he gets all the burdens and none

of the benefits; and while it is of course theoretically possible that Congress meant to do this, it is hardly more. We do not think that we do too much violence to the word by so declaring. Though the donee has not literally "held" the property for two years, he is treated as though he had; his acceptance of the gift is regarded as a vicarious substitution of himself for the donor. Only so, can he become subject to a tax upon the whole appreciation "realized" by his sale, part of which is otherwise wholly foreign to him. All we have to do is to carry over that substitution into section 206 (a)(6); that is, to read the two sections together. In so doing we merely carry forward and make comprehensive the purpose of section 206 (c) itself, which was to avoid the "freezing" of property because of high surtaxes. Report of Ways & Means Com. on House Rep. 8425, House Rep. 350, 67th Cong., First Session, p. 10. The classic instance of such a treatment of a statute is *Holy Trinity Church* v. *United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226. We do not forget that courts must not make law, but only declare it; but there is no vade mecum to guide us between a sterile literalism which loses sight of the forest for the trees, and a proper scruple against imputed meanings for which the words give no warrant. That there comes a point at which we must be content to treat the purpose as ineffectively expressed, we readily agree, though no one

> ean fix it a priori. But that does not absolve us in a given case, and here we find no sufficient obstacle in the language used; rather we think the generative purpose can infuse it.

That case holds that the date fixed for ascertaining the basis for determining gain must also be used in finding the rate of tax to be applied to the gain, that is, in determining the period the property was held. There, under a statute requiring the donee of property to use the basis of the donor for computing the amount of gain but not specifically providing for the inclusion of the donor's tenure in reckoning the period of holding by the donee for capital gain purposes, it was held that the two related provisions must be read together and since the donee is taxed on the gain accrued over the entire period from the date of the donor's acquisition, thus treating the property as then acquired by the donee, the property will be deemed to have been held by the donee for the same period. In the instant case the applicable provision of the statute directs that the basis of property acquired by intestacy shall be the value thereof when distributed to the taxpayer, not the basis in the hands of the decedent or any other basis, but the related section defining capital gains does not itself fix the date of acquisition of such property for the purpose of determining the period of holding by the taxpayer. Applying the rule of the *N. Y. Trust Co.* case, it

must be concluded that Congress did not intend that the date of distribution should be used in fixing the basis for gain, or should be considered the date of acquisition for basis purposes, and at the same time treat the property as having been held by the taxpayer from the time of the decedent's death for the purpose of determining the rate at which that gain should be taxed. If, as the *N. Y. Trust Co.* case holds, the date of acquisition of property for purposes of determining the period of holding and the rate of tax is the same as that prescribed for the purpose of determining the amount of taxable gain, or in other words, the period of holding for rate purposes is co-extensive with the period of accumulation of the gain to be taxed, it is clear that the petitioner held the stock in question only from the time of distribution to her, less than two years. The fortuitous circumstance that in the instant case the tenure is shortened and in the *N. Y. Trust Co.* case the holding period was extended does not affect the principle involved.

The conclusion that the holding of property acquired by intestacy dates, under the Revenue Act of 1928, only from the time of distribution is further supported by the fact that Congress specifically provided for the situations in which the tenure of a predecessor was to be added to that of the successor for the purpose of determining whether the successor had held the property the requisite two years, whereas that was not true under the Revenue Act of 1921, involved in the *N. Y. Trust Co.* case.

Section 101 (c) (8) (B) of the Revenue Act of 1928, *infra*, provides:

> (B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

We submit that since Congress specifically provided that where the succeeding owner was required to use the same basis as his predecessor, the tenure of both should be added in determining whether the two-year requirement was satisfied, it obviously meant that in cases where the successor did not use the same basis the successor's tenure alone should be regarded. In this case although the petitioner, having acquired the stock by gift, is entitled to include in her holding period the tenure of the donor, as we have pointed out that fact is immaterial, for under the circumstances of this case, the donor having acquired the property by intestacy, her tenure in nowise enlarges the holding period of the petitioner. The result in this case is the same as if the petitioner acquired the stock directly by intestacy. In that view the petitioner's predecessor was the decedent's estate, or the executors thereof, and she was not required to use the

same basis as such predecessor.[2] Hence, only her own tenure may be considered. Construed otherwise, Section 101 (c) (8) (B) would be meaningless.

This construction of the statute, approved by the court below, is in accord with *Rufus R. Rand, Jr.* v. *Commissioner, supra; Ogle* v. *Helvering*, 77 F. (2d) 338 (C. C. A. 2d); *Dibblee* v. *Commissioner, supra.*. In the *Rand* and *Ogle* cases petitions for certiorari are now pending, Nos. 439 and 137, October, 1935, Term.. In the *Rand* case the Circuit Court said (p. 10,353):

> Taking up next whether section 113 is so related in its subject matter to section 101 that they should be construed together. This question seems directly determined by *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, when considered in connection with the situation here. * * *
>
> Here there is a clear relation between section 113 and section 101. Both deal with taxation of gains derived from sales of property. The former determines the measurement of such gains for all income tax purposes, irrespective of rate of taxation to be applied. Such measurement required a statement, in general or particular terms, of the base value date and such dates are stated

[2] The executor uses the fair market value of the stock as of the date of death of the decedent under Section 113 (a) (5). See also, *Anderson* v. *Wilson*, 289 U. S. 20; *Commissioner* v. *Stearns*, 65 F. (2d) 371 (C. C. A. 2d), certiorari denied, 290 U. S. 670.

therein as to various situations. Section 101 is a rate of tax provision applicable to the taxable sale gains as measured in 113. Section 101 required a prescribed holding period to make its privileges available to the taxpayer—obviously, any holding period must have a legal beginning or base value date. Thus the situation is that of a taxable gain measure base value date (Section 113) and a tax rate base value date (Section 101) upon the gain so measured—both applying to the same character of gain, to-wit, from sales of property. Clearly the two are closely related and there should be no construction as to this date in 101 without regard to 113.

In the *Ogle* case the court said (p. 339):

> The word "held" is indeed colloquial; we need not say that it always implies possession; it does not. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 54 S. Ct. 806, 78 L. Ed. 1361; *Commissioner* v. *Nevius*, 76 F. (2d) 109 (C. C. A. 2). But in this context we think it does. Otherwise we should have to say that between the intestate's death and distribution the administrator and the next of kin both "held" the personalty. * * * Moreover, in general the statute makes the time at which the "basis" is fixed, the starting point of the period which determines the privilege. So strong is this as even to control the term "held," when its natural meaning is otherwise. *Helvering* v. *New York Trust Co., supra.*, 292 U. S. 455, 54 S. Ct. 806, 78 L. Ed. 1361. Here we need do no

violence to that word in order to conform with the general plan; rather we should have to wrench it unduly to do anything else. Finally, the privilege is in any case a partial exemption, and the taxpayer must bring herself clearly within it.

The argument of the petitioner is based almost entirely upon the assumed premise, for which *Brewster* v. *Gage, supra,* is cited as authority, that the residuary legatee or heir necessarily acquires personal property from a decedent at the time of death and *holds* such property from that time. The premise with so broad and universal an application is fallacious and the argument founded thereon is unsound. It may be true that, generally, in law the title to personal property acquired by a general or residuary legatee or by intestacy relates back and takes effect *as of the date* of the decedent's death, but the fact remains that the legal title does not actually vest until distribution and as a practical matter a general legatee or heir, unlike a specific legatee or devisee, acquires no particular identified personal property of a decedent's estate until distribution. Prior to that time he has only a right to his share of the personal estate remaining for distribution and although upon distribution his title relates back and takes effect as of the date of death he does not hold any specific personal property until it is distributed to him.

Brewster v. *Gage, supra,* does not support the position urged by the petitioner. That case must

be read in the light of the facts presented and the statutes involved. The Court was there concerned with the basis for determining gain or loss on property sold by a residuary legatee within the meaning of the Revenue Acts of 1918 and 1921. The 1921 Act, which was not materially different from the 1918 Act, provided, generally, that the basis for gain or loss of property acquired by bequest, devise, or inheritance, should be the value thereof at the time of such acquisition. The Court specifically recognized that the title to the personal property belonging to the decedent vested at death in the executors as trustees, but also noted that the legatee's right to have his share of the residue delivered to him later also vested immediately upon the decedent's death and the legal title which he *subsequently acquired* upon distribution related back to the time of death. Accordingly, the Court, construing the general phrase of the statute, "at the time of such acquisition", held in the absence of an express statutory provision to the contrary that the property was acquired at the date of the decedent's death.

The Court expressly recognized, however, that there was a different rule under the Revenue Act of 1928. The taxpayer there sought to have retroactive effect given to Section 113 (a) (5) of the Revenue Act of 1928. This was denied, but in its opinion, the Court, speaking of that section of the 1928 Act, said (280 U. S. at 337):

> The Revenue Act of 1928, § 113 (a) (5), expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed the fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. 819. The deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears. *United States* v. *Magnolia Co.*, 276 U. S. 160, 162, and cases cited. There is no support for the suggestion that subdivision (5) expressed the meaning, or was intended to govern or affect the construction, of the earlier statutes.

The language of the Court points out the intention of Congress to change the law and determines that Section 113 (a) (5), Revenue Act of 1928, expressly fixed the fair market value at the time of distribution to the taxpayer as the basis for personal property passing by general bequest or by intestacy.

The failure of the petitioner to recognize the true effect of this fundamental difference between the Revenue Act of 1928, which is controlling here, and the 1918 and 1921 Acts considered in *Brewster* v.

Gage, supra, may account for her mistaken reliance upon that case.

Indeed, *Brewster* v. *Gage, supra,* although relied upon by the petitioner, directly supports the position of the respondent. Read in the light of the statutes involved and the recognition of the change in the applicable provisions made by the statute here involved, that decision holds in effect that *in the absence of a provision to the contrary* a residuary legatee acquires property at the date of the decedent's death. The plain and inescapable inference from the decision is that where the statute specifically prescribes the value of property at the time of distribution as the basis for measuring gain or loss such property is considered as acquired by the taxpayer at the same time. And having declared when the property is to be treated as acquired, the date of acquisition remains the same for the purpose of determining the period of holding and the applicable rate of tax as well as for the purpose of measuring the gain to be taxed. It is not logical to presume that Congress deliberately fixed a date for determining the basis of property wholly without regard for the date when the two-year holding period should begin. Every consideration of consistency, logic, and reason requires that the two dates coincide; no reason has or can be suggested why they do not coincide.

The Circuit Court of Appeals for the First Circuit in *First Nat. Bank of Boston* v. *United States,*

76 F. (2d) 200, and *Lee* v. *Commissioner*, 76 F. (2d) 203, held contrary to the position of the Commissioner and the decisions of the Second, Third, Eighth, and Ninth Circuit Courts of Appeals in the *Ogle, Rand, Dibblee* and instant cases. We respectfully submit that the decisions of the Circuit Court of Appeals for the First Circuit are erroneous for the following reasons:

(1) The court misunderstood the theory of the Government's case. The Government contended that Section 101 (c) (8) and Section 113 (a) (5) of the Revenue Act of 1928 must be read together and in so doing the intention of Congress that the two-year holding period of a general or residuary legatee should begin at the date of distribution is clear. It was not the theory of the Government as the First Circuit stated (p. 201) that a legatee acquires title from the executor: The Government's position was that legal refinements as to the vesting of title were immaterial.

(2) The court was led into error through its misconception of the holding and import of *Brewster* v. *Gage, supra,* when it failed to note that this Court there clearly pointed out that the law was changed by Section 113 (a) (5) of the Revenue Act of 1928. The court erroneously refused to recognize and give effect to this change in the law and the manifest intent of Congress. S. Rep. No. 960, 70th Cong., 1st Sess., p. 26.

(3) The court ignored the established rule of statutory construction, recently recognized by this

Court in *Helvering* v. *N. Y. Trust Co., supra* (p. 464), that the strict letter of a statute cannot be permitted to defeat the clear legislative intent and purpose.

(4) The court ignored the ruling in *Helvering* v. *N. Y. Trust Co., supra,* that the provision defining capital assets and the provision fixing the basis are applicable to different elements of the same or like transactions and must be read together.

Section 101 (c) (8) provides generally that property must be held by the taxpayer for more than two years to be a capital asset. It then provides a number of exceptions to the rule, none of which are material to this case, as we have pointed out above. The incorporation in these exceptions of subdivision (B) relating to cases where the successor is required to use the predecessor's basis makes it impossible to construe Section 101 independently of Section 113, as the petitioner seeks to do, and indicates that Congress meant for the successor not to have the benefit of the predecessor's tenure when he was not required to use the predecessor's basis.

That conclusion is fortified when we turn to Section 113 (a)(5), which makes the basis the time of distribution. If the petitioner is treated as having held the stock in question only from that date for the purpose of measuring the gain, she must be treated as having held it only for the same period for the purpose of determining her tenure under the capital gain provision, since the two provisions

are related. See *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121; *Helvering* v. *N. Y. Trust Co., supra; Hellmich* v. *Hellman*, 276 U. S. 233.

We do not see that this construction violates any rule of construction cited by the petitioner, or that the statute should be construed otherwise to avoid what the petitioner terms absurdities, discriminations, and injustices. The anomaly suggested by the petitioner (Br. 44–45) that under the view here urged, the longer she held the stock, the shorter the period of her holding, loses all significance when it is recalled that entirely different statutes were in effect and controlled the transaction on the respective dates of sale suggested. If the sale had been made on the earlier date the Revenue Act of 1926 would have governed, whereas the sale actually made on the later date is controlled by the Revenue Act of 1928 under which, as we have explained, an entirely different rule was prescribed. The same contention was made by the taxpayer in the *Rufus R. Rand, Jr.*, case, *supra*, and was rejected by the court. See page 10354, C. C. H., 1935, Vol. 3–A.

The argument of the petitioner (Br. 45–48) that she acquired property in 1924 by gift (made absolute in 1925) which she held for more than two years may prove confusing, unless it is remembered that the property so acquired in 1924 or 1925 was not the same property she sold in 1929. Prior to the distribution on November 3, 1927, the only property which the petitioner had by virtue of the gift was a right to a portion of her mother's one-

half interest in the decedent's estate, whatever that might be shown to be after settlement of the estate and on distribution of the assets. Prior to November, 1927, neither the petitioner nor her mother had any ownership of or right to the 1,000 shares of Radio stock, which is the property sold in 1929, or to any other specific asset of the estate not then actually distributed. When this fact is kept clearly in mind it is plain that the property here in question was not acquired and was not held, within the meaning of the statute, by the petitioner prior to the distribution of the stock to her on November 3, 1927.

The petitioner's argument appears to be that since the provisions of Section 101 (c) (8) were the same in the Revenue Acts of 1926, 1932, and 1934, as in the Revenue Act of 1928, here involved, it would be absurd to apply those provisions differently because of the change in the basis from that provided in Section 113 (a) (5). But, if Congress meant the sections relating to basis to be construed in conjunction with those relating to capital gains, as this Court said that it did in the *N. Y. Trust Co.* case, *supra,* it necessarily intended to establish a different rule, even though the general definition of "capital assets" remained the same in the several Acts. There is no reason why Congress may not change the operation of one section by changing another section to which it relates. We have pointed out that the establishment of a differ-

ent rule in the 1928 Act was the result solely of the confusion that existed under the earlier Acts. When that confusion was eliminated and the construction of the earlier Acts was settled by judicial decision in the *Brewster* v. *Gage* case, Congress in the 1934 Act merely reverted to the rule of the earlier Acts so that there might be uniformity in the provisions relating to the acquisition of property from a decedent's estate and the basis thereof for gain or loss. It is not apparent how the application of the provisions of the 1928 Act differently from corresponding provisions of the other Acts results in any absurdity, when the 1928 Act clearly prescribes a different rule from that established by the other Acts. See *Rufus R. Rand, Jr.* v. *Commissioner, supra.*

Nor does the construction of Sections 101 (c) (8) and 113 (a) (5) together to establish the date of acquisition for purposes of determining the period of holding, as we contend must be done, in anywise contravene or thwart the purpose of the capital gain provisions of the statute to stimulate sales and encourage profit taking. The impelling consideration for those provisions was that the gain subjected to taxation accrued over a period of years during which the property was held by the taxpayer. The taxable gain, however, is measured by the cost or other basis of the property to the taxpayer, which in the case of a general legatee is, under the 1928 Act, the value of the property at the time of distribution. Hence, the gain taxable to

the petitioner, who acquired the stock through her mother by intestacy, is only that amount accrued thereon from the date the stock was distributed to her and not the gain accrued from the date of the decedent's death. Whatever gain accrued between the date of death and the time of distribution is not taxable to the petitioner. The capital gain provisions were designed as a relief to only those taxpayers who bear the burden of the tax on the realized gain which accrued to the property over the specified period of years. Thus it is apparent that the construction of Sections 101 (c) (8) and 113 (a) (5) together, so that the date of acquisition for the purpose of establishing the basis also determines the period of holding the property, not only is far from inconsistent with the legislative purpose but indeed is essential to the accomplishment of the declared intent and purpose of the statute.

In this connection the court in the *Rand* case, *supra*, said (p. 10,354):

> If the taxpayer had held the property only during the tax year of realization, clearly there was no purpose in relieving him from any part of the regular tax. Congress had in mind the one situation of gain accumulated over a longer period. This it clearly expressed in the requirement that the property should be "held" for more than two years. Nor was Congress interested in accumulations which were not taxable to the taxpayer involved for such lay entirely outside its purpose in enacting the capital gains

rate. The only thing involved was accumulations of taxable gain *by the particular taxpayer*. Therefore, to give full effect to the purpose of 101 and, at the same time, to limit that section to its full purpose, the two-year period must be construed as controlled by the taxable gain provisions of section 113—unless (not true here) Congress has clearly expressed some other intention.

From the foregoing, we submit, it is clear that the petitioner's mother, who acquired her interest in the decedent's estate by intestacy, did not acquire the Radio stock, within the meaning of the applicable Revenue Act, until the distribution thereof on November 3, 1927, and held the same for income tax purposes only from that date. It necessarily follows, we think, that the petitioner, who derived *her right* to the stock by gift from her mother, did not acquire the stock until the distribution thereof to her on November 3, 1927, and held the same for income tax purposes only from that date, because obviously the petitioner could not have acquired the stock before her donor had acquired the same. While the gift of the portion of the mother's inchoate interest, by reason of which the petitioner became entitled to and received the stock, was made in 1925 prior to the date of distribution, the gift could not become effective to constitute acquisition of this particular stock by the petitioner within the meaning of the statute until distribution thereof from the estate. It is apparent, therefore, that because of the gift in 1925

of an inchoate and indeterminate interest in the decedent's estate the petitioner acquired the stock in question at the same time such stock was acquired by her mother, within the purview of the Revenue Act, so that for the purposes of this case it is unnecessary to consider independently the date of acquisition and period of holding by the mother. Hence, it is manifest that the result is the same in this case whether the petitioner be considered as having acquired the stock by gift from her mother or by intestacy direct from the decedent's estate. In either view, it must be concluded from what we have said that the petitioner acquired the stock in question on the date of distribution, November 3, 1927, and held the same only from that date within the meaning of the statute. It follows that the stock, having been sold in March, 1929, was held less than two years and the profit thereon is not a capital net gain taxable at the special rate, but ordinary net income taxable at the usual rates.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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OCTOBER 1935.

APPENDIX

Statute and Other Authorities Involved

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 815, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property;

* * * * *

(2) Gift after December 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) Transfer in Trust after December 31, 1920.—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the

basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *.

Treasury Regulations 74:

ART. 596. *Property transmitted at death.* —In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

S. Rep. 960, 70th Cong., 1st Sess. (p. 26):

> Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

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Nos. 24, 110, 111, 439, and 494

In the Supreme Court of the United States

OCTOBER TERM, 1935

NANCY K. McFEELY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FRANCES G. LEE

RUFUS R. RAND, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ISABEL K. DIBBLEE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE THIRD, FIRST, EIGHTH, AND NINTH CIRCUITS

PETITION FOR A REHEARING

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 24

NANCY K. MCFEELY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 110

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES

No. 111

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FRANCES G. LEE

No. 439

RUFUS R. RAND, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 494

ISABEL K. DIBBLEE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE THIRD, FIRST, EIGHTH, AND NINTH CIRCUITS

34466—35

PETITION FOR A REHEARING

Comes now the Solicitor General, on behalf of the United States and the Commissioner of Internal Revenue, and respectfully prays that the judgments heretofore entered in these causes be vacated, that the mandates thereon be stayed, and that a rehearing of these causes be granted.

These causes were argued together, the question involved being common to all, during the present term of Court at the session of the Court held October 24, 1935. The question involved is whether personal property acquired from a decedent through intestacy or a general bequest is held, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, from the date of the decedent's death or from the date of distribution. On November 11, 1935, this Court handed down its opinion holding that in such cases the property is held from the date of the decedent's death. Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo dissented.

We respectfully submit that the conclusion of the Court in these cases is erroneous, is inconsistent with the plain intent and purpose of the statute and cannot be reconciled with this Court's decision in *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455. In referring to the *N. Y. Trust Co.* case as not being authority here, the Court was in error in stating the inconsistency in the statutory provisions there involved and, we believe, failed to recognize the

essential basis of that decision. The Court, rejecting our contention that the *N. Y. Trust Co.* decision requires the reading of Section 101 (c) (8) and Section 113 (a) (5) together, said that the Revenue Act of 1921, involved in the *N. Y. Trust Co.* case—

> exhibited an inconsistency *in that while a donee was permitted to tack his tenure to that of his donor, he was not permitted to use his donor's basis.* (Italics supplied.)

The Revenue Act of 1921 *required* the donee of property acquired by gift after December 31, 1920, to compute his gain on a sale thereof upon *the donor's basis* (Section 202 (a) (2)) but did not in terms authorize the donee to include the donor's tenure in reckoning the period of his holding under the provisions granting the special rate of tax on capital gains. Section 206 (a) (6). This Court held, in the *N. Y. Trust Co.* case, that the two sections if read separately and without regard each to the other rendered the Act inconsistent, in that the amount of gain taxed to the donee accrued over a period of more than two years and yet would not be allowed the preferential rate of tax intended by Congress to be applied to such gains. The impelling consideration for allowing the special rate was that the gain had been earned or accrued over a series of years, not merely that the gain was large, and Congress fixed a term of more than two years as the period during which the gain must

have accumulated to entitle the taxpayer to the preferential rate. It was so argued by the taxpayer in the *N. Y. Trust Co.* case (p. 459) and this Court there recognized that Congress so intended (p. 467).

In the instant cases, as in the *N. Y. Trust Co.* case, the section prescribing the basis for determining the amount of gain and the section authorizing the special rate of tax (Revenue Act of 1928, Sections 101 (c) (8) and 113 (a) (5)) are applicable to different elements of the same or like transactions and should not be regarded as unrelated. It is essential in these cases, as it was in the *N. Y. Trust Co.* case, that the two sections be read together if the very policy and purpose of the capital gains provisions are to be effected. Under the ruling handed down in these cases the taxpayers are given the benefit of the preferential tax rate upon a gain which was earned and accrued during a period of less than two years, whereas Congress clearly intended that the reduced rate should be available only as to gains accumulated over a period of more than two years. Thus, the construction approved by the Court in these cases injects into the statute the very inconsistency which was removed by the *N. Y. Trust Co.* decision from the statute there involved.

This construction of the Act does not require a departure from the literal meaning of Section 101 (c) (8) and does not in anywise penalize these

taxpayers. That section defines capital assets as property *held* for more than two years, but does not undertake to define the term "held" or otherwise independently mark the commencement of the period. This Court has recognized that the definition standing alone, while superficially clear, is ambiguous and requires interpretation. *Helvering* v. *N. Y. Trust Co., supra.*

Moreover, under the Acts prior to the 1928 Act, as interpreted and administered, the date specified as fixing the base likewise established the rate. Accordingly, if Congress must be deemed to have enacted the Revenue Act of 1928 with knowledge of the administrative construction and application of the earlier Acts it must have intended that the date for base should continue also to fix the rate and accordingly when the date for base was changed to the date of distribution it was unnecessary to alter the general definition of capital assets. Wherever Congress has fixed a base different from date of acquisition, there has been no doubt of the latter and the variance is founded in sound reason. The date of distribution was fixed by the 1928 Act for the base of property received from a decedent as in these cases because of the doubt as to the proper date of acquisition and there is no sound reason for establishing base as of a date different from what Congress determined should be considered the date of acquisition.

Adherence to the principle established in the *N. Y. Trust Co.* case, that the date for base also fixes the holding period for getting the rate, in nowise penalizes these taxpayers. The preferential capital gain rate was designed to relieve those taxpayers bearing the burden of the tax on gains accumulated over a period of more than two years, *and to no others.* These taxpayers are taxable only upon the gain accrued since the date of distribution, a period of less than two years. If the statute is construed as in the opinion rendered in these cases, then the two-year period fixed by Congress as the minimum for accumulation of gains entitled to the preferential rate is nullified where the property was received from a decedent by intestacy or general bequest.

The rule that taxing statutes, if of doubtful intent, are to be construed favorably to the taxpayer should not be applied in these cases. The provision of the statute here involved is one granting a preferential rate of tax, a partial exemption from the normal or full rate of taxation. The applicable rule in such cases is that all doubts must be resolved *against the taxpayer. Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235. In the *N. Y. Trust Co.* case, Mr. Justice Roberts, dissenting, pointed out that this is the rule applicable in construing the capital gains provisions of the revenue acts. The majority opinion in the *N. Y. Trust Co.* case does not deny the application of this rule or invoke the

rule of liberal construction in favor of the taxpayer, but rather construes the statute to effect the clear intent and purpose of Congress and relies only on the rule that a statute should not be expounded strictly according to the letter without regard to the manifest purpose and policy of the legislation.

For the foregoing reasons it is respectfully submitted that the present petition should be granted. It is also prayed that the mandates in these causes, and in *Kate A. Ogle* v. *Helvering, Commissioner,* 1935 Term, No. 137, which is to abide the decision in No. 439, be stayed pending disposition of this petition and until further order of this Court.

Copies of this petition have been served upon counsel for the taxpayers.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

DECEMBER, 1935.

CERTIFICATE

I certify that this petition is presented in good faith and not for delay.

STANLEY REED,
Solicitor General.

U.S. GOVERNMENT PRINTING OFFICE: 1935

CLERK'S OFFICE

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 110

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI, FILED JUNE 7, 1935

CERTIORARI GRANTED, OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 110

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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1 [Captions omitted.]

In United States District Court, District of Massachusetts

No. 5841, Law Docket

THE FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES U/W Edward E. Blodgett, petitioners

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition

Filed December 29, 1933

The petitioners say:

FIRST. That they are residents of Boston and Brookline, respectively, in the district of Massachusetts, and that they are, and were at all times hereinafter referred to, the trustees under the will of Edward E. Blodgett, late of Newton in said district.

SECOND. That as such trustees they duly filed, within the time prescribed by law and the regulations of the Commissioner of
2 Internal Revenue, a return of their income as such trustees for the calendar year 1928, said return being filed in the office of Thomas W. White, the then collector of internal revenue for said district.

THIRD. That within the time prescribed by law they duly paid to said collector the tax shown by said return to be due.

FOURTH. That thereafter the Commissioner of Internal Revenue erroneously and without warrant in law assessed against your petitioners an additional income tax of $4,500.26 with respect to their income for said year, which additional assessment, together with the interest thereon amounting to $544.47, was paid by your petitioners on April 3, 1931, to said collector pursuant to notice and demand, which collector, as your petitioners are informed and believe and therefore say, in turn turned it over to the United States.

FIFTH. That a part of said additional assessment was based upon the erroneous inclusion by the Commissioner as a part of the taxpayer's net income subject to normal and surtaxes of net profits amounting to $74,773.03 from the sale of securities, which securities your petitioners say had been "held by them" for more than two years and constituted "capital assets" within the meaning of those words as used in section 101 of the Revenue Act of 1928, and which net profits your petitioners say constituted a "capital net gain" and, as your petitioners had elected, were taxable as such under said section.

SIXTH. That the balance of the additional assessment was based upon the erroneous disallowance by the Commissioner of deductions amounting to $8,752.85 from their net income, which deductions represented the amount of the net income of the trust for said tax-

able year which was "to be distributed currently" by the petitioners to the beneficiary, Mabel F. Blodgett, the widow of the said Edward E. Blodgett, to which deduction your petitioners say they were entitled under the provisions of section 162 (b) of the Revenue Act of 1928.

SEVENTH. That within the time prescribed by law, to wit, on July 29, 1931, your petitioners duly filed with the collector of internal revenue for the district of Massachusetts a claim for refund, copy of which is hereto annexed, which claim was disallowed in its entirety by the Commissioner on January 22, 1932.

3 EIGHTH. That said Thomas W. White has since resigned his office as said collector, and on September 1, 1933, Joseph P. Carney became the collector of internal revenue for said district.

NINTH. That your petitioners are advised and therefore aver that the collection from them of the said additional assessment and interest amounting to $5,044.73 on April 3, 1931, was illegal, erroneous, and unlawful, and that there is justly due and owing to them from the United States on account of the matters hereinbefore set forth the said sum, with interest thereon at the rate of six per centum per annum from April 3, 1931, as provided by law.

TENTH. That your petitioners have made no assignment or transfer of their said claim or any part thereof and that there are no credits or offsets due from them to the United States and that they have at all time shown true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Wherefore your petitioners pray judgment against the United States for $5,044.73 with interest at six per centum per annum from April 3, 1931, as provided by law, and for their costs in this suit.

THE FIRST NATIONAL BANK OF BOSTON and
MABEL FULLER BLODGETT,
Trustees u/w Edward E. Blodgett,
By GEORGE S. FULLER, *Its Attorney.*

[*Duly sworn to by George S. Fuller, jurat omitted in printing.*]

4 *Exhibit to petition*

CLAIM TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[X] Refund of tax illegally collected.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Name of taxpayer or purchaser of stamps The First National Bank of Boston et als., trustees u/w of Edward E. Blodgett.

Business address, 17 Court Street, Boston, Massachusetts.

Residence (please address communications c/o George S. Fuller, 1 Federal Street, Boston, Mass).

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, Boston, Mass.

2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1928, to Dec. 31, 1928.

3. Character of assessment or tax Additional Income Tax.

4. Amount of assessment, $4,500.26; dates of payment, April 3, 1931.

5. Date stamps were purchased from the Government.

6. Amount to be refunded, amount paid on 4/3/31, $5,044.73, with interest since that date.

7. Amount to be abated (not applicable to income or estate taxes).

8. The time within which this claim may be legally filed expires, under section 322 of the Revenue Act of 1928, on April 3, 1933.

The deponent verily believes that this claim should be allowed for the following reasons:

A. That the transfer by the Commissioner, in taxpayer's income-tax return for 1928, of profits of $74,773.03 from capital net gain to ordinary income was without authority of law, for the reason that the securities which were the subject of said gain were "capital assets" in the hands of the taxpayer within the meaning of section 101(c)(8) of the Revenue Act of 1928. This question was the subject of a formal protest dated July 7, 1930, filed with the internal-revenue agent in Boston, on which a hearing was had. This protest was overruled by Department letter dated February 19, 1931 (IT: AR: B–1 SMC–60D).

B. That the taxing to the taxpayers of income for the year 1928 in the amount of $8,752.85, distributed to Mabel F. Blodgett (said income admitted by the Commissioner to be nontaxable to said Mabel F. Blodgett because taken by her in lieu of dower rights and therefore constituting return of capital) was without authority of law.

C. That the assessment of said additional tax of $4,500.26 and interest was further without authority of law for the following reasons:

Taxpayers' income-tax return for the year 1928 was filed on or about March 15, 1929.

In accordance with the provisions of section 272 (a) of the Revenue Act of 1928 notice of deficiency of income tax for the year 1928 in the amount of $4,500.26, was mailed to taxpayers, said notice being dated February 19, 1931.

In accordance with the provisions of section 272 (d) of said act, on March 6, 1931, attorney for taxpayers sent by registered mail to the Commissioner of Internal Revenue at Washington, waiver of right to appeal to the Board of Tax Appeals and waiver of the re-

strictions provided for in section 272 (a) of the Revenue Act of 1928, to the assessment and collection of said alleged deficiency. Postal receipt for said registered letter shows receipt of the waiver by the Commissioner's office on March 9, 1931, before the expiration of two years from the date the return was filed.

Taxpayers contend that the filing of said waiver cancelled the suspension on the running of the statute of limitations provided for in section 277 of the Revenue Act of 1928 and made it incumbent upon the Commissioner to assess any deficiency within two years from the date the return was filed—as provided in section 275 (a) of said act. The taxpayers have been informed by the Commissioner, however, that the assessment of the deficiency was made on March 21, 1931, more than two years from the date the return was filed.

6 The return was filed by the above-named fiduciaries and their appointment is still in force and they are acting as such.

THE FIRST NATIONAL BANK OF BOSTON,
Trustee.

By H. N. ANDREWS,
Trust Officer for Self and/or Cotrustees.

Sworn to and subscribed before me this twenty-eighth day of July, 1931.

[SEAL] EVELYN L. SHEEHY,
Notary Public.

In United States District Court

Answer

Filed February 14, 1934

Now comes the respondent in the above-entitled action and for its answer to the petition on file herein denies each and every mat'rial allegation, item, count, and particular in said petition contained.

By its attorney,

FRANCIS J. W. FORD,
United States Attorney.
By J. M. LEINENKUGEL,
Special Assistant to the United States Attorney.

In United States District Court

Statement of agreed facts

Filed March 16, 1934

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be takes as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and

further evidence not inconsistent with the facts herein stipulated to be taken as true:

1. Edward E. Blodgett, late of Newton, Massachusetts, died April 4, 1926, leaving the will, a copy of which is hereto annexed and made a part hereof, which will was allowed by the probate court
7 having jurisdiction thereof, to wit, the probate court for the county of Middlesex in Massachusetts on May 4, 1926, and Mabel Fuller Blodgett was on that date appointed and qualified as the executrix of said will.

2. The petitioners, The First National Bank of Boston and Mabel Fuller Blodgett, are residents of Massachusetts and are the trustees of the residuary estate under article fourth of the will.

3. The petitioners, on or prior to March 15, 1928, filed with the collector of internal revenue at Boston, Massachusetts, income tax returns as such trustees on forms 1040 and 1041 with respect to the income of the trust estate for the calendar year 1928. The amount of the tax shown by their return on form 1040 to be due, to wit, $9,483.98, was paid by the petitioners to Thomas W. White, the then collector of internal revenue at Boston, who in turn turned it over to the United States.

4. Thereafter on March 21, 1931, within the time allowed by law, the Commissioner of Internal Revenue assessed against the petitioners an additional income tax for the year 1928 in the amount of $4,500.26 with interest thereon of $544.47, making a total assessment of tax and interest $5,044.73, which amount was paid by the petitioners to said Thomas W. White, the then collector of internal revenue at Boston, on April 3, 1931, who in turn turned it over to the United States.

5. Said additional assessment was based solely upon the following action of the Commissioner.

(a) The disallowance by the Commissioner of a deduction of $8,752.86, which deduction had been taken by the petitioners in determining the amount of their net income, said sum being the amount of the payments made by the trustees to Mabel Fuller Blodgett, the widow of the testator Edward E. Blodgett, under (b) and (e) of article fourth of the will, $4,800 under (b) and $3,952.86 under (e).

(b) The transfer by the Commissioner from capital net gain to ordinary income of the sum of $74,773.08. This sum represented the profit realized by the petitioners from the sale in 1928 of cer-
8 tain securities belonging to the trust estate. These securities had all been the property of the decedent and a part of his estate at the time of his death, which was more than two years before the date of sale, but they had been received by the petitioners from the executors as a part of the petitioners' share as residuary legatees within two years from the date of sale. The bases used in determining the amount of the profit, both by the petitioners and by the Commissioner, was the fair market value of such property on

the date it was transferred by the executors to the petitioners, in accordance with section 113 (a) (5) of the Revenue Act of 1928.

6. On July 29, 1931, the petitioners filed with the collector of internal revenue at Boston, Massachusetts, a claim for refund for the full amount of said additional assessment, a copy of which claim is hereto annexed and made a part hereof.

7. On January 22, 1932, the Commissioner of Internal Revenue rejected the claim in its entirety.

8. On September 1, 1933, said Thomas W. White resigned his office as collector of internal revenue and Joseph P. Carney succeeded him as such collector.

9. No other action has been had on said claim in Congress or in any of the other departments. No other action on said claim is pending in any court. No one other than the petitioners are the owners thereof or interest therein, and no assignment or transfer of this claim or of any part thereof or any interest therein has been made. The petitioners at all times have borne true allegiance to the Government of the United States and have not in any way aided, abetted, or given encouragement in rebellion against said Government.

GEORGE S. FULLER,
Attorney for Plaintiff.
FRANCIS J. W. FORD,
United States Attorney.
J. A. LYONS,
Special Assistant to the United States Attorney,
Attorneys for Defendant.

9 *Exhibit to Agreed Statement of Facts*

Know all Men by these Presents:

That I, Edward E. Blodgett, of Newton in the County of Middlesex and Commonwealth of Massachusetts, do make this my last will, hereby revoking all wills heretofore made by me.

After the payment of my just debts and funeral expenses and expenses of administration I give, devise and bequeath as follows:

FIRST. To each of the following named I give the sum set after his or her name, and direct that said sums be paid as soon as possible after my decease:

To my wife, Mabel Fuller Blodgett, one thousand ($1,000) dollars.

To my son, Robert Fuller Blodgett, five hundred ($500) dollars.

To my daughter, Ruth Blodgett Shedden, five hundred ($500) dollars.

[In margin:] E.E.B.

To my daughter, Dorothy Blodgett, five hundred ($500) dollars.

To Mrs. Fannie M. Hosley, two hundred and fifty ($250) dollars.

To John Tyler, if he be in my employ at the time of my death, one thousand ($1,000) dollars.

SECOND. To my wife, Mabel Fuller Blodgett, I give all my automobiles and their accessories and any household furniture and furnishings now on the premises 174 Temple Street, West Newton, Massachusetts, not the property of my wife, and all my clothing, jewelry, books, and other like articles of a personal nature.

THIRD. I direct that all legacy, inheritance, estate and succession taxes, under whatever law imposed, upon any devise, legacy or bequest in this will, or in any codicil hereto, shall be paid by my executors out of the residue of my estate.

FOURTH. All the rest and residue of my estate, real and personal, and wherever situated, I give, devise, and bequeath to my wife, Mabel Fuller Blodgett, and to The First National Bank of Boston, and their successor or successors, jointly, but in trust nevertheless to hold, manage, invest and reinvest the same and from the income thereof, or from the principal if necessary, to make payments, if possible and practicable, commencing within sixty days of the qualification of my executors, and to permit the use of the Wianno property as follows:

(a) To allow my said wife, Mabel Fuller Blodgett, to use the premises now owned by me at Wianno, Massachusetts, together with the furniture and fittings therein, free of all rent and other charges whatsoever, so long as she may desire to occupy them, and I hereby direct my said trustees to hold said premises, furniture, and fittings, and keep them in good order, condition, and repair; to pay all taxes, insurance, and other expense of upkeep of said property and its furnishings, but if at any time she determines not to occupy said premises, then my trustees are to rent, sell, or otherwise dispose of the property as they may see fit, and in that event, said premises and the furnishings therein, or the proceeds received from the sale thereof, are to be held as a part of trust fund by my said trustees.

[In margin:] E.E.B.

(b) To my wife, Mabel Fuller Blodgett, for her own use, four hundred ($400) dollars per month during her life.

(c) To each of my said three children, Robert Fuller Blodgett, Ruth Blodgett Shedden and Dorothy Blodgett, the sum of one hundred and fifty ($150) dollars per month during their respective lives.

(d) To Mrs. Fannie M. Hosley the sum of one hundred ($100) dollars per month during her life.

(e) To pay out the balance of the net income as often as convenient, and at least annually, in four equal shares, to my wife and my three children.

(f) On the death of my wife I direct that the share of the income given to her be added to the income payable to my three children.

(g) In the event of the death of either my daughter, Ruth Blodgett Shedden, leaving issue or of my daughter, Dorothy Blodgett, leaving issue, whether such death occur before or after the death of

my wife, I direct that such issue be paid the parent's share of the income until the death of the last survivor of my children. In the event of the death of my son, whether that occur before or after the death of my wife, he leaving issue, I direct that, until the
11 death of the last survivor of my children, his share of the income be divided equally between his issue and his widow, so long as she shall remain his widow; if said widow shall die or remarry I direct that all of said income representing my son Robert's share be thereafter paid to his issue until such time as the principal shall be divided in accordance with the provisions hereinafter made; upon the death of my said son leaving no issue but leaving a widow surviving him, I direct that the sum of one hundred and fifty ($150) dollars per month be paid to such widow until such time as she may remarry and as long as she remains his widow.

[In margin:] E. E. B.

(h) Except as above provided, in case of the death of any of my said children leaving no issue I direct that the share of such deceased child in the income of the fund shall thereafter be divided among my surviving children in equal shares (the issue of any deceased child taking the parent's share) until the termination of this trust.

(i) After the death of my said wife and the death of the last survivor of my said children, Robert Fuller Blodgett, Ruth Blodgett Shedden, and Dorothy Blodgett, I direct that the principal of the trust fund, after making provision for payment to my son's widow as herein directed, shall be divided among my grandchildren, per capita and not per stirpes; provided, that if the widow of my said son shall still be living and unmarried, I direct my trustees, before such distribution to my grandchildren, to set apart such principal sum as in the judgment of my trustees is necessary for the purpose, and thereafter to continue to pay to said widow the sum of one hundred and fifty ($150) dollars per month during her life or so long as she may remain my son's widow. On the death or remarriage of my son Robert Fuller Blodgett's widow after the decease of the last survivor of my own children, I direct that the principal of the trust fund which has been held for the purpose of paying the income provided for to her shall be in like manner divided among my grandchildren, per capita and not per stirpes.

(j) All payments under the trusts hereinbefore established are to be made to the beneficiaries personally, if convenient, or upon their respective personal receipt in writing, and in either case are to
12 be free from the interference or control of any of their creditors, and neither beneficiary is to have any power of anticipation or assignment, nor is any creditor or assignee to have any right or power to reach said payments by attachment or by any process at law or in equity.

[In margin:] E. E. B.

FIFTH. I hereby give my said trustees full power and authority in the investment, reinvestment, and management of said trust property, to sell the same, or any part thereof, at public auction or private sale,

without seeking the aid or instructions of any court, and to execute and deliver all proper deeds and other instruments of transfer without in any event making the purchaser answerable for the application of the purchase money; and for the purpose of making payment of any specific legacies given by this will, and whenever it shall become necessary to make any final distribution of any property held in trust under this will, I give my said trustees full power and authority in their discretion, if they shall deem it necessary, to mortgage and hypothecate the whole or any part of said trust property, for the purpose of realizing any cash which may be necessary for the purpose of such payment or distribution.

The trustees shall retain in the trust fund my said Wianno property and hold the same in accordance with the terms and conditions heretofore set forth, and in their discretion may retain in the trust fund any other property, real or personal, in the form of investment in which such property is received by the trustees under this will, even though the same is not a trust investment, or is unproductive of income, or is a larger proportion in one investment than the trust estate should hold, and may invest or reinvest the whole or any portion of said trust fund in any property, real, personal, or mixed, and wherever situated, in which a reasonably prudent man in like circumstances would invest his own property.

SIXTH. I nominate and appoint my wife, Mabel Fuller Blodgett, to be the executrix of this will and in case of the death of my said wife or her inability to serve as executrix I nominate my daughter, Ruth Blodgett Shedden, to act in her stead as such executrix, provided my said daughter be at the time living in the Commonwealth of Massachusetts. If my said daughter Ruth be not at such
13 time living in Massachusetts, then in such event I nominate and appoint my daughter Dorothy Blodgett, provided she be at such time living in the Commonwealth of Massachusetts, to act as such executrix. I have not nominated or suggested my son Robert Fuller Blodgett as executor of this will by reason of the fact that his service in the Army makes it seem improbable that he would be able to serve.

[In margin:] E. E. B.

SEVENTH. In case of the death of my wife, Mabel Fuller Blodgett, or the inability of either of my trustees to serve as such under this will, it is my wish that at least one trustee hereunder be nominated in accordance with such wish as may be expressed by my surviving children.

EIGHTH. I direct that my executor and trustees be exempt from giving any sureties on any bonds required of them by law as such executor or trustees.

In testimony whereof I hereunto set my hand in the presences of three witnesses, declaring this to be my last will and testament, this 3rd day of June A. D. 1925.

EDWARD E. BLODGETT. [SEAL]

On the 3rd day of June A. D. 1925 Edward E. Blodgett, of Newton, Massachusetts, signed the foregoing instrument in our presence, declaring it to be his last will, and as witnesses thereof we three do now, at his request, in his presence, and in the presence of each other, hereto subscribe our names.

FREDERICK W. EATON,
Concord, Massachusetts.
JOSEPH C. HANNON,
One Federal Street, Boston.
FREDERICK D. NICHOLS,
Taunton, Massachusetts.

[In margin:] E. E. B.

[Memorandum: Claim for refund is here omitted as it will be found printed on page 4 of this transcript of record. James S. Allen, clerk.]

Recital as to hearing

On the said sixteenth day of March A. D. 1934 said cause was set down for hearing on the agreed statement of facts, the Honorable Elisha H. Brewster, district judge, sitting.

14 Said cause was thence continued under advisement to the March term, A. D. 1934, when, to wit, May 11, 1934, the following petitioners' requests for rulings of law were filed by consent:

Petitioners' requests for rulings of law

Filed by consent May 11, 1934

[Memorandum: Copy of petitioners' requests are here omitted, as they will be found printed in the petitioners' bill of exceptions, on page 23 of this transcript of record. James S. Allen, clerk.]

In the United States District Court

Petitioners' motion for judgment

Filed May 11, 1934

Now come the petitioners and on the pleadings and evidence move that judgment be entered for the petitioners for the amount of the excess tax and interest paid by the petitioners resulting from the failure of the Commissioner to allow petitioners to deduct from their gross income the sum of $3,952.86 referred to in paragraph 5 (a) of the statement of agreed facts, and from the action of the Commissioner in refusing to permit petitioners to have their tax with respect to the sum of $74,773.08 referred to in paragraph 5 (b) of the statement of agreed facts taxed under the provisions of section 101 of the Revenue Act of 1928 and requiring that said sum be

included in the petitioners' ordinary net income subject to normal and surtaxes, and that judgment include interest as provided by law, and costs.

By their attorneys.

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD.

The respondent assents to the filing of this motion at this time.

FRANCIS J. W. FORD,
United States Attorney.
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

Motion denied.

E. H. B., *D. J.*

15 In United States District Court

Recital as to respondent's request for findings of fact and ruling of law

Filed by consent May 11, 1934

[Memorandum: Copy of respondent's requests for findings of fact and rulings of law are here omitted, as they will be found printed in the petitioners' bill of exceptions, on page 24 of this transcript of record. James S. Allen, clerk.]

In United States District Court

Respondent's motion for judgment

Filed by consent May 11, 1934

Now comes the respondent and moves that, on the pleadings and evidence, any judgment entered herein for the petitioners be limited to the excess payment resulting from the disallowance by the Commissioner of Internal Revenue of a deduction of $3,952.86 as set forth in paragraph 5 (a) of the statement of agreed facts filed herein.

By its attorney.

FRANCIS J. W. FORD,
United States Attorney.
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

Recital as to further hearing

This cause was thence continued to the June term, A. D. 1934, when, to wit, August 7, 1934, the Honorable Elisha H. Brewster, district judge, sitting, said cause came on for further hearing on the agreed statement of facts and it was ordered that petitioners' request no. 1 for rulings be granted, all other requests being denied and that

the respondent's request that the court find the facts to be as stipulated and its requests for ruling of law be granted, petitioner's exception to the ruling of law being saved. It was further ordered that petitioner's motion for judgment be denied and the respondent's motion for judgment be allowed, petitioners' exceptions being saved.

On the said seventh day of August, an opinion of the court was announced, holding petitioners are entitled to recover in these proceedings.

16 This cause was thence continued to the present September term, A. D. 1934, when, to wit, September 17, 1934, a draft bill of exceptions is filed by the petitioners and assented to.

On the thirtieth day of October, A. D. 1934, the petitioners' bill of exceptions is allowed by the court.

Also, on the said thirtieth day of October, A. D. 1934, the following motion for entry of judgment is filed by the petitioners and allowed by the court:

In United States District Court

Petitioners' motion for entry of judgment forthwith

Filed and allowed October 30, 1934

Now come the petitioners and say that on August 7, 1934, this court allowed the respondent's motion that "any judgment entered herein for the petitioners be limited to the excess payment resulting from the disallowance by the Commissioner of Internal Revenue of a deduction of $3,952.86 as set forth in paragraph (5) of the statement of agreed facts filed herein", the respondent having conceded that such disallowance was erroneous and the petitioners further say that their bill of exceptions in the above-entitled cause has been allowed.

Wherefore, the petitioners move that judgment be entered for them forthwith in the amount of $979.15 (the respondent having agreed that said sum is the excess payment resulting from such disallowance), with interest thereon as provided by law from April 3, 1931, and costs.

By their attorneys,

BURNHAM, BINGHAM, PILLSBURY, DANA, & GOULD,
GEORGE S. FULLER.

October 30, 1934, allowed.

E. H. B., *D. J.*

In United States District Court

Judgment

Thereupon, to wit, October 30, 1934, it is considered by the court, the Honorable Elisha H. Brewster, district judge, sitting, that the

said the First National Bank of Boston and Mabel Fuller Blodgett, trustees u/w Edward E. Blodgett, recover of the said the
17 United States of America, respondent, the sum of nine hundred seventy-nine dollars and fifteen cents ($979.15) damages together with interest thereon as provided by law from April 3, 1931, and their costs of suit taxed at

In United States District Court

Opinion of the court

August 7, 1934

[7 Fed. Supp. 915]

BREWSTER, J.: This action is brought by trustees under a will to recover an additional income tax assessed for the year 1928. The additional assessment was due, in part, to the refusal of the Commissioner to allow, as a deduction from income, $8,752.86 paid by the trustees to the widow of the testator under certain provisions of the will. The differences respecting the rights to this deduction have been disposed of by the case of Helvering v. Butterworth, 290 U. S. 365. It is now conceded that the sum of $4,800 was properly disallowed, and that the balance of $3,952.86 should have been deducted.

A controversy arises over the action of the Commissioner in transferring from capital net gain to ordinary income subject to normal and surtaxes the sum of $74,773.08. This sum represents the gain realized by the trustees from the sale in 1928 of certain securities which had been a part of the testator's property at the time of his death and which had been received by the trustees from the executrix within less than two years from the time of the sale in 1928.

In arriving at the amount of the profits arising from the sale, both the petitioners and the government have taken as a cost basis the market value on the dates when the securities were received by the trustees from the executrix. The testator, Edward E. Blodgett, died April 4, 1926, more than two years before the sale by the trustees. The pertinent sections of the Revenue Act of 1928 are as follows:

"Sec. 101. Capital Net Gains and Losses

"(a) Tax in case of capital net gain.—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there
18 shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain. . . .

"(c) Definitions.—For the purposes of this title—

"(1) 'Capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921. . . .

"(8) 'Capital assets' means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition— . . . .

"(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

"Sec. 113. Basis for Determining Gain or Loss

"(a) Property acquired after February 28, 1913. The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that— . . .

"(5) Property transmitted at death. If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent.

If the property was acquired by the decedent's estate from the
19 decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases, if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust insrument had been a will executed on the day of the grantor's death; . . ."

The decisive question involved here is whether the securities sold by the trustees come within the definition of capital assets under section 101 (c) (8) as property held by the taxpayer for more than two years. It is the petitioners' contention that since property of a decedent which is received by a legatee or distributee is acquired by him at the date of his death (Brewster *v.* Gage, 280 U. S. 327) it follows that the property was held by the trustees for more than two years.

Under the earlier revenue acts, the Board of Tax Appeals and the courts had held that the provisions of law fixing the basis for determining gain or loss and those laying a tax on capital gains were quite independent of each other, with the result that the date of acquisition by the former owner was taken as a basis for arriving at the gain or loss, while the date of acquisition of the succeeding owner controlled his rights to the benefits of the capital gain sections of the law. Johnson *v.* Com'r of Internal Revenue, 52 F. (2d) 726; Schoenberg *v.* Burnet, 55 F. (2d) 543.

A contrary rule was adopted in the Second Circuit in New York Trust Co. *v.* Com'r of Internal Revenue, 68 F. (2d) 19, which case was affirmed by the Supreme Court in Helvering *v.* New York Trust Co., — U. S. —, 78 L. Ed. 960. That case, which arose under the Revenue Act of 1921, involved property received as a gift by way of trust. The statute (sec. 202 (a) (2)) definitely prescribed that the basis for determining gain or loss should be the same as that which it would have in the hands of the donor. It was there held that, although the donee had acquired the gift less than two years before the sale of the subject matter of the gift, the gain could nevertheless be taxed under the capital gain provisions of the act (sec. 206 (b)).

In that case the court refers to the fact that the Commissioner had combined periods in which the shares were held by the trustor and the trustee, respectively, for the purpose of ascertaining the taxable gain, but had ascertained the applicable rate by breaking the continuity. It then said:

"Sections 202 (a) and 206 (a) (6) are included in the same act and are applicable respectively to different elements of the same or like transactions, and are not to be regarded as wholly unrelated. While undoubtedly legally possible and within the power of Congress, the methods adopted and results attained by the Commissioner are so lacking in harmony as to suggest that the continuity required to be used to get the base was also intended for use in finding the rate. No valid ground has been suggested for requiring tenures to be added for the one purpose and forbidding combination for the other. The legislative purpose to be served by the application of the lower rate upon capital gains is directly opposed to the Commissioner's construction. There is no ground for discrimination such as that to which the trustee was subjected. It is to be inferred that Congress did not intend penalization of that sort."

By 1928 the revenue laws had undergone material modifications with respect to the basis for determining gain and loss, and the words "capital assets" had been more particularly defined. Under earlier acts, down to and including the Revenue Act of 1926, the basis for determining the gain or loss resulting from the sale of property acquired by bequest, devise or inheritance, was the fair market value of the property at the time of such acquisition (Revenue Act of 1926, sec. 204 (a) (5)), and under the rule laid down in Brewster *v.*

Gage, supra, there can be no doubt that the time of acquisition was the date of the death of the testator. In 1928 the law was changed so that the basis for determining gain or loss arising from
21 the sale of property transmitted at death, in cases such as the one with which we are here concerned, was the fair market value at the time of the distribution to the taxpayer. The petitioners and the respondent both concede that the gain was properly determined by using as the cost of the property the fair market value of the property at the time it was turned over to the trustees.

The provisions relative to net capital gains and losses also underwent changes. In the act of 1926, for the first time, there appear provisions elaborating the definition of capital assets and these elaborations were carried forward in the Revenue Act of 1928. It is said in Helvering v. New York Trust Co., supra, that these additional provisions were merely declaratory of the prior law, the purpose of which was to clarify what was doubtful as to existing law. But whether the law is old or new, the provisions of section 101 (c) (8), (B) govern the rights of the petitioners. There can be no room for misapprehension as to what the law was in 1928. In determining the two-year period, during which the taxpayer must hold property in order that it come within the definition of "capital assets", the period for which the property was held by any other person was to be included only if, under the provisions of section 113, the property, for the purpose of determining gain or loss from the sale, has the same basis in his hands as it would have in the hands of such other person. Section 113 is the section dealing with rules for determining gain or loss. Under the provisions of that section, the property sold by the petitioners did not have in their hands the same basis for determining gain or loss that it would have had in the hands of the executrix. If the executrix had sold the securities involved here, the cost would have been the fair market value at the time of death (Commissioner v. Stearns, 65 F. (2d) 371), whereas by virtue of section 113 the cost was the fair market value at the time of the distribution. Clearly, therefore, the petitioners' case does not fall within the terms of section 101 (c) (8), (B).

The apparent purpose of the extended definition of capital assets was to avoid the unjust consequences which flowed from the earlier definition as the law was construed and applied by some of the appellate courts and the Internal Revenue Department. If
22 the period of ownership of the next preceding owner was to be included for the purpose of ascertaining gain and loss, it was also to be added for the purpose of fixing the rate of the tax. In my opinion, Congress intended that the converse should be equally true. It would seem to follow, as a necessary corollary, that if the continuity of successive ownerships is to be broken for the one purpose, it is also to be broken for the other.

This conclusion would seem to be in complete harmony with Helvering v. New York Trust Company, supra, and recent decisions

of the Board of Tax Appeals. Dibblee v. Com'r, 29 B. T. A. 1070; Nancy K. McFeely, 29 B. T. A. 998.

In order to reach the result, it has not been necessary to combine periods of ownership of two owners for one purpose and to break the continuity for another. The same date is resorted to both for the purpose of determining the gain and for determining the rate of the tax applicable to the gain.

So far as the petitioners' argument is predicated upon the decisions of the Board of Tax Appeals, and the uniform administrative construction of the capital gain section prior to the 1928 act, it has been much weakened by the observation of Mr. Justice Butler, in speaking for the court in Helvering v. New York Trust Co., supra.

In view of the Government's concession that $3,952.86 was improperly disallowed, the petitioners are entitled to recover in these proceedings. I have no doubt the parties can agree as to the extent of the Government's liability, if determined according to this opinion. If they cannot so agree, the case may stand for hearing as to the amount of the judgment.

In United States District Court

Petitioners' bill of exceptions

Filed September 17, 1934; allowed October 30, 1934

This was a petition by The First National Bank of Boston et al., trustees under the will of Edward E. Blodgett, late of Newton, in the district of Massachusetts, against the United States to recover
Federal income taxes alleged to have been erroneously and
23 illegally assessed and collected in the amount of $5,044.73, with interest from April 3, 1931.

The case was tried before Brewster, J., on March 16, 1934, on the pleadings and a statement of agreed facts, which are hereby referred to and made a part hereof.

The foregoing constitutes all the evidence in the case.

At the trial, the petitioners requested the court to make the following rulings of law:

Petitioners' requests for ruling of law

"1. That the petitioners were entitled to a deduction from their gross income of the sum of $3,952.86 referred to in paragraph 5 (a) of the statement of agreed facts in determining the amount of their net income for the year 1928 subject to normal and surtaxes.

"2. That the securities, the gain from the sale of which is referred to in paragraph 5 (b) of the statement of agreed facts, constituted 'capital assets' of the petitioners within § 101 of the Revenue Act of 1928.

"3. That the sum of $74,773.08, referred to in paragraph 5 (b) of the statement of agreed facts, constituted 'capital net gain' under § 101 of the Revenue Act of 1928.

"4. That the petitioners were entitled to have their income tax for the year 1928 with respect to the sum of $74,773.08 referred to in paragraph 5 (b) of the statement of agreed facts taxed under the provisions of § 101 of the Revenue Act of 1928 rather than have said sum included as a part of its ordinary net income subject to the normal and surtaxes under said Act."

At the trial, petitioners also filed the following written motion for judgment:

Petitioners' motion for judgment

"Now come the petitioners and on the pleading and evidence move that judgment be entered for the petitioners for the amount of the excess tax and interest paid by the petitioners resulting from the failure of the Commissioner to allow petitioners to deduct from their gross income the sum of $3,952.86 referred to in paragraph 5 (a) of the statement of agreed facts and from the action of the Com-
24 missioner in refusing to permit petitioners to have their tax with respect to the sum of $74,773.08 referred to in paragraph 5 (b) of the statement of agreed facts taxed under the provisions of section 101 of the Revenue Act of 1928 and requiring that said sum be included in the petitioners' ordinary net income subject to normal and surtaxes, and that judgment include interest as provided by law, and costs."

The respondent at the trial requested the court to make the following ruling of law:

Respondent's requests for ruling of law and for judgment

"The respondent requests the court to find as a matter of law that the securities in question not having been 'held' by the taxpayer for more than two years did not constitute capital assets within the meaning of section 101 (c) (8) of the Revenue Act of 1928, and that the gain on the sale of said securities was properly computed by the Commissioner of Internal Revenue as ordinary income."

And also filed the following written motion for judgment:

"Now comes the respondent and moves that on the pleadings and evidence, any judgment entered herein for the petitioners be limited to the excess payment resulting from the disallowance by the Commissioner of Internal Revenue of a deduction of $3,952.86 as set forth in paragraph 5 (a) of the statement of agreed facts filed herein."

The trial was continued generally and on August 7, 1934, during the course thereof, the court found the facts to be as set forth in the statement of agreed facts and granted the petitioners' request no. 1, the same having been conceded by the respondent. The court then denied the rest of the petitioners' said requests for rulings of law and

also denied the petitioners' motion for judgment, and the petitioners duly claimed their exceptions thereto and the same were saved by the court. The court then also granted the respondent's request for ruling of law, and the respondent's motion for judgment, and the petitioners duly claimed their exceptions thereto and the same were saved by the court.

25 On the same day the court handed down a written opinion, which is hereby referred to and made a part hereof, in which it held that the securities, the gain ($74,773.08) from the sale of which was referred to in paragraph 5 (b) of the statement of agreed facts, did not constitute "capital assets" of the petitioners within section 101 of the Revenue Act of 1928, and that said gain did not constitute "capital net gain" to the petitioners under section 101, but constituted ordinary net income, taxable at the normal and surtax rates under said act.

In the course of its opinion, the court ruled that the provisions of section 101 (c) (8) (B) of the Revenue Act of 1928 govern the rights of the petitioners, and it also in effect ruled that the petitioners did not hold the securities in question from the date of the decedent's death, but that they "held" them (within the meaning of the word "held" as used in said section 101 (c) (8)) only from the date when the securities were distributed to them by the executors of the decedent's estate, and that they were "held" by another person or persons, to wit, said executors, from the date of the decedent's death to such date of distribution. To each of these rulings the petitioners also except.

The petitioners, being aggrieved by the denial of the court of their said requests for rulings of law and of their said motion for judgment, and being further aggrieved by the granting by the court of the respondent's request for ruling of law and the respondent's motion for judgment, and by the rulings of the court in its opinion, now except thereto and bring this bill of exceptions and pray that it may be allowed.

By their attorneys.

GEORGE S. FULLER,
BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD.

Assented to.

FRANCIS J. W. FORD,
United States Attorney.
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

26 *Order allowing bill of exceptions*

Allowed October 30, 1934.

ELISHA H. BREWSTER,
United States District Judge.

Recital as to order allowing appeal

From the foregoing judgment the petitioners claim an appeal to the United States Circuit Court of Appeals for the First Circuit on November 7, 1934, said appeal being allowed by the court on the same day.

Recital as to bond on appeal

On the fourteenth day of November, A. D. 1934, a bond on appeal for costs in the sum of two hundred and fifty dollars ($250) was filed by the petitioners, the Fidelity and Deposit Co. of Maryland acting as surety. Said bond on appeal was approved by the court on the fifteenth day of November 1934.

In United States District Court

Assignment of errors

Filed November 7, 1934

The petitioners, in connection with their petition for appeal, make the following assignment of errors which they aver occurred in the trial of this case, to wit:

1. The district court erred in holding that the gain ($74,773.08) from the sale of securities referred to in paragraph 5 (b) of the statement of agreed facts did not constitute "capital net gain" to the petitioners taxable under section 101 of the Revenue Act of 1928, but constituted ordinary net income taxable at the normal and surtax rates under said act.

2. The district court erred in granting the respondent's motion that any judgment herein for the petitioners be limited to the excess payment resulting from the disallowance by the Commissioner of Internal Revenue of a deduction of $3,952.86 as set forth in paragraph 5 (a) of the statement of agreed facts.

By their attorneys.

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD.
GEORGE S. FULLER.

Recital as to citation and service

A citation on appeal was issued on the fifteenth day of
27 November, A. D. 1934, being returnable in the United States Circuit Court of Appeals on December 15, 1934. Service of said citation was duly acknowledged by counsel for the respondent.

[Clerk's certificate to foregoing transcript omitted in printing.]

28 [Minute entry of hearing, Jan. 8, 1935, omitted in printing.]

29 In United States Circuit Court of Appeals for the First Circuit

October term, 1934

No. 2984

THE FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES, PETITIONERS, appellants

v.

UNITED STATES OF AMERICA, DEFENDANT, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, AND MORTON, JJ.

Opinion of the court

March 9, 1935

WILSON, J.: This is an appeal from a judgment of the District Court of Massachusetts on a petition to recover a refund of $5,044.73 alleged to have been illegally assessed and collected of the petitioners as taxes on income of a trust for the calendar year 1928.

The Commissioner included in the income of the petitioners as subject to the normal and surtax the sum of $74,773.08, as gain from the sale of securities which the petitioners claim have been held by them for more than two years and should have been treated as capital gain under sec. 101 of the Revenue Act of 1928.

It is also urged that the Commissioner erroneously disallowed as a deduction from the income of the trust the sum of $8.752.86 which the trustees claimed should be allowed as income distributed by the trustees to the beneficiary under sec. 162 (b) of the Revenue
30 Act of 1928. Of this item, it is conceded, as we understand it, that the Commissioner did erroneously disallow the sum of $3,952.86, which should have been deducted from the gross income received by the trust, it being a part of the trust income to be distributed currently to the beneficiary under the terms of a testamentary trust; and that by reason of this error there was an overpayment of $979.15 for which judgment was given in the district court.

The district court disallowed the claim of the petitioners that the gain in the sale of securities amounting to $74,773.08 should be considered as a capital gain, and held that it was a part of the income of the petitioners subject to the normal and surtax provisions. This is the only issue now before this court.

Edward E. Blodgett died April 4, 1926. By his will he bequeathed to the petitioners as trustees the residuum of his estate consisting, in part, at least, of securities. Sometime after April 4, 1928, and more than two years after the testator's death, but less than two years after they were turned over to the trustees by the executor of the will, some of the securities were sold by the trustees at a gain of $74,773.08 over their value at the time of distribution, which value, under sec. 113 (a) (5) of the Revenue Act of 1928, was the basis for determining gain or loss in case of residuary bequests.

The petitioners contend that under the rule laid down in Brewster v. Gage, 280 U. S. 327, as to the date of acquisition, and according to the laws of Massachusetts, the securities had been held by the trustees for more than two years and the gain was, therefore, a capital gain and should have been taxed as such under sec. 101 (a) of the act of 1928. The Government, however, contends that Congress has a right to determine what shall be considered capital assets and the basis for determining gains and losses; and that, inasmuch as the basis for determining the gain or loss in case of a sale of per-
31 sonal property acquired under a residuary bequest is fixed in sec. 113 (a) (5) of the same act as the value at the time of distribution, Congress must have intended that in such case the date from which the two-year period is to be computed is also the date of distribution. The Government also contends, since the provisions of sec. 101 (c) (8) B provide that, in determining the period during which a taxpayer has held property, there shall also be included the period for which such property has been held by any other person, provided that under the provisions of sec. 113 such property has for the purpose of determining gain or loss the same basis, in whole or in part, in the hands of the taxpayer as it would have had in the hands of such other person, that the period during which these securities were held by the executor cannot be added to the time in which they were held by the trustees; since the basis for computing the gain, if sold by an executor, is the value at death of the testator, while in the case of the residuary legatee it is the date of distribution.

It should be noted, however, that the reference in sec. 101 (C) (8) B is not alone to para. (a) (5) of sec. 113, but to the entire section, which contains other instances of the arbitrary fixing of the base value for determining gains and losses. This contention of the Government is evidently based on the theory that a legatee acquires title from the executor; but since a legatee, whether special or residuary, does not acquire his title from the executor, but under the will, Brewster v. Gage, supra; Chandler v. Field, 63 Fed. (2d) 13, 15, certiorari denied, 289 U. S. 758; Davis v. Newton, 6 Met. 537, 541; Hooper et al. v. Bradford, 178 Mass. 95, 97, sec. 101 (c) (8) B has no application to this case. Personal property transmitted at death is not held by the representatives of the estate within the meaning of sec. 101 (c) (8) B. The executor or administrator can only be said to hold it for the limited purpose of administration, or, as has been said, in autre droit, or as a quasi trustee for

the benefit of the legatees or heirs. Lathrop v. Merrill, 207 Mass. 6, 10.

32 In Brewster v. Gage, supra, the court said, p. 334:

"Immediately upon the death of the owner there vests in each of them (referring to a legatee or heir) the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution * * * Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs of legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death."

It is clear that acquisition as used in these acts means acquisition of title and not of possession.

As the Committee on Ways and Means pointed out in its report to the House #704 on the Revenue Act of 1934, with respect to the change in sec. 113 (a) (5) of the pending bill from that of the act of 1928:

"The change in the 1928 act was made because there was some doubt as to the meaning of the term 'acquisition', which was the term used in the act of 1926. Since the 1928 act was passed, the Supreme Court has defined the 'date of acquisition' to mean the date of death in the case of all property passing by bequest, devise or inheritance, whether real or personal. (Brewster v. Gage, 280 U. S. 327.) Sec. 113 (a) (5) of the bill conforms to the language contained in the act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal."

In the 1921 act, sec. 206 (a) (6), it was provided that to constitute capital assets, property must be "acquired and held" for two years. In subsequent acts the word "acquired" has been omitted, the obvious reason is that the word "acquired" was surplusage, since, in general, property is held from the time it is acquired or one's ownership begins.

A comparison of corresponding sections in prior acts: Secs.
33 206 (a) (6), and 202 (a) (3) of the 1921 act; secs. 208 (a) (8) and 204 (a) (5) of the 1924 act; secs. 208 (a) (8) and 204 (a) (5) of the 1926 act, discloses that capital assets are determined by the time property is "held", while gains and losses are computed from the value as a base at the time of acquisition, except in certain instances of an arbitrary fixing of the base value. It was not until the insertion of sec. 113 (a) (5) in the 1928 act that any change was made in the base for computing gains between personal property transmitted at death by special bequest and by residuary bequests.

It is significant, however, that even in para. (a) (5) of sec. 113 of the 1928 act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides that, "If personal property is acquired by specific bequest", etc., and "in all other cases, if the property was *acquired either by will or intestacy.*" (Italics supplied.)

Sec. 101 and sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.

In other words, Congress intended only by the change in sec. 113 (a) (5) of the 1928 act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the administrative bureau as to date of acquisition of such property. It, however, made no substantial change in sec. 101 of that act from the provisions of sec. 208 (a) (8) of the 1926 act for determining what are capital assets.

In view of the purpose, which has repeatedly been recog-
34 nized both by the administrative bureau and the courts of allowing a gain from the sale of property held for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the revenue acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the Government in construing sec. 113 (a) (5) of the 1928 act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for computing gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by sec. 113 (a) (5) of the act of 1928 to effect a change in the period during which property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in sec. 101 of that act.

There is nothing new in fixing an arbitrary date for determining the base value for computing gain or loss in the sale of property and different from that when the property was acquired by the taxpayer. In case of property purchased prior to 1913, it was fixed as of March 1, 1913, unless the cost price was in excess of their value on that date; also see sec. 208 (a) (8) of the 1926 act, and see sec. 113 (a) (1) (2) (3) (4) (6) of the 1928 act.

We find nothing in the decisions in Helvering v. New York Trust Co., 292 U. S. 455, or Helvering v. Bliss, 293 U. S. 144, which mod-

ifies the rule laid down by the Supreme Court in Brewster v. Gage, supra, in construing the sections of the earlier acts corresponding to sec. 113 (a) (5). Under the rule laid down in Brewster v. Gage, supra, we think the petitioners acquired the corpus of the trust on April 4, 1926, and therefore held it more than two years prior to the sale, and that the District Court erred in holding that under the provisions of sec. 101 (c) (8) B of the 1928 act, the
35 taxpayer had not held the securities sold since the death of the testator.

The gain of $74,773.08 resulting from the sale of securities by the trustees, therefore, should have been treated as a capital gain, and in order to determine the total amount to which the petitioners are entitled as a refund, the case must be remanded for a recomputation of the tax in accordance with this opinion.

The judgment of the District Court is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

In United States Circuit Court of Appeals

Judgment

March 9, 1935

This cause came on to be heard January 8, 1935, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, March 9, 1935, here ordered, adjudged, and decreed as follows: The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Recital as to issuance of mandate

Thereafter, to wit, on April 9, 1935, mandate issued.

[Clerk's certificate to foregoing transcript omitted in printing.]

37 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is assigned for argument immediately following No. 24.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 39,664. U. S. Circuit Court of Appeals, First Circuit. Term No. 110. The United States of America, petitioner, vs. The First National Bank of Boston et al., Trustees, etc. Petition for a writ of certiorari and exhibit thereto. Filed June 7, 1935. Term No. 110 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE, 1935

FILE COPY

No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

THE FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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139748—35

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

THE FIRST NATIONAL BANK OF BOSTON ET AL., trustees

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of The United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above cause on March 9, 1935, reversing the judgment of the District Court of the United States for the District of Massachusetts.

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Massachusetts (R. 17–22) is reported in 7 F. Supp. 915. The opinion of the Circuit Court of Appeals (R. 29) is reported in 76 F. (2d) 200.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the judgment of the District Court was entered March 9, 1935. (R. 33.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether personal property of a decedent, passing to the taxpayers otherwise than by specific bequest, may be considered to have been held by the taxpayers, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, during any period prior to actual distribution to the taxpayers.

STATUTE INVOLVED

The statute involved will be found in the Appendix, *infra,* pp. 8–9.

STATEMENT

This is an action by trustees (hereinafter called taxpayers), under a will, to recover additional income tax assessed against them for the year 1928. The facts were found by the District Court to be as stipulated (R. 15) and may be summarized as follows (R. 6–8):

Edward E. Blodgett of Newton, Massachusetts, died April 4, 1926 (R. 6), leaving a will (R. 9–13) by the terms of which *inter alia* he devised the residue of his estate to the taxpayers in trust.

The decedent's will was duly probated, and the widow of the decedent qualified as executrix of the will. The taxpayers filed on March 15, 1929,[1] with the Collector of Internal Revenue at Boston, Massachusetts, income-tax returns as trustees with respect to the income of the trust estate for the calendar year 1928. The amount of the tax shown to be due was duly paid to the then Collector of Internal Revenue at Boston, Massachusetts, who, in turn, paid it over to the United States. (R. 7.)

Thereafter, on March 21, 1931, within the time allowed by law, the Commissioner of Internal Revenue assessed against the taxpayers an additional income tax for the year 1928 in the amount of $4,500.26 with interest of $544.47, which amounts, in the total sum of $5,044.73, were paid April 3, 1931, to the then Collector of Internal Revenue, who duly covered them into the Treasury of the United States. (R. 7.)

After due claim for refund had been filed by the taxpayers with the Collector of Internal Revenue on July 29, 1931, and rejected by the Commissioner of Internal Revenue on January 22, 1932 (R. 8), the taxpayers instituted these proceedings in the District Court for recovery of the full amount of the additional assessment.

---

[1] The stipulation (Par. 3) sets this date as 1928, but this is an obvious error.

Part of such additional assessment was based upon the following action of the Commissioner of Internal Revenue (R. 7–8):

> The transfer by the Commissioner from capital net gain to ordinary income of the sum of $74,773.08. This sum represented the profit realized by the petitioners [the taxpayers] from the sale in 1928 of certain securities belonging to the trust estate. These securities had all been the property of the decedent and a part of his estate at the time of his death, which was more than two years before the date of sale, but they had been received by the petitioners from the executors as a part of the petitioners' share as residuary legatees within two years from the date of sale. The bases used in determining the amount of the profit, both by the petitioners and by the Commissioner, was the fair market value of such property on the date it was transferred by the executors to the petitioners, in accordance with Section 113 (a) (5) of the Revenue Act of 1928.

The District Court sustained the action of the Commissioner in transferring from capital net gain to ordinary income the sum of $74,773.08, which represented the profit realized by the taxpayers from the sale in 1928 of certain securities belonging to the trust estate. Judgment on that point for the United States was accordingly entered by the District Court. (R. 16.) The only question presented to the Circuit Court of Appeals

was whether the item of $74,773.08 should be taxed as capital net gain or as ordinary income. That court reversed the District Court, holding that the taxpayers were to be considered as having held the securities in question from the date of the death of the decedent, and that such date being more than two years prior to the taxpayers' sale of the securities, the securities were in their hands "capital assets" and the gain "capital net gain."

SPECIFICATION OF ERRORS TO BE URGED

The United States urges that the Circuit Court of Appeals erred:

1. In holding that the taxpayers, as residuary legatees receiving personal property upon distribution of the decedent's estate, were to be deemed to have held such property from the date of the decedent's death for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*.

2. In failing and refusing to hold that for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*, the taxpayers, as residuary legatees, should be deemed to have held personal property received upon distribution of the decedent's estate only from the date of actual distribution to the taxpayers.

3. In reversing the judgment of the District Court and remanding the case.

REASONS FOR GRANTING THE WRIT

The court below decided that a residuary legatee, receiving personal property upon distribution of a decedent's estate, should be deemed to have held such property from the date of the decedent's death for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*.

This decision conflicts in principle with the decision of the Circuit Court of Appeals for the Third Circuit in *McFeely* v. *Commissioner*, 74 F. (2d) 1017. The taxpayer in that case applied to this Court for a writ of certiorari, and in its petition asserted a conflict between the decision in that case and the decisions of the court below in the present case and in the case of *Lee* v. *Commissioner*, 76 F. (2d) 203. While the facts in the *McFeely* case are different from the facts in the present case in that there the taxpayer is the donee of a widow who had elected under the laws of Pennsylvania to take against the will of her deceased husband and here the taxpayers are residuary legatees, yet the broad question in both is whether personal property of a decedent, passing to the taxpayer otherwise than by specific bequest, may be considered to have been held by the taxpayer, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, during any period prior to actual distribution to the taxpayer. In the *McFeely* case it was decided that the property was "held" only from the date of distribution, while

in the present case it was decided that the property was "held" from the date of decedent's death. Believing that the decisions were in conflict in principle, the Government did not oppose the granting of the writ in the *McFeely case*. This Court granted certiorari on May 20, 1935, No. 876, October Term, 1934.

The decision of the court below in the present case is also in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Ogle* v. *Helvering*, decided May 6, 1935, not officially reported but found in Vol. I, Prentice-Hall, 1935, par. 1316. In that case the court held that for the purpose of Section 101 (c) (8) of the Revenue Act of 1928, *infra*, the taxpayer, one of the next of kin of an intestate decedent, "held" personal property only from the date of distribution of the property to her and not from the date of the decedent's death. The court there expressly recognized a conflict between its decision and the decision of the court below in the present case.

The Circuit Court of Appeals for the Ninth Circuit in *Dibblee* v. *Commissioner*, 75 F. (2d) 617, has also decided the question contrary to the decision below, but that case is now pending on the taxpayer's petition for rehearing.

Wherefore, it is respectfully prayed that this petition be granted.

STANLEY REED,
Solicitor General.

JUNE 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 822:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

* * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

* * * * *

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 110

UNITED STATES OF AMERICA, PETITIONER

v.

THE FIRST NATIONAL BANK OF BOSTON ET AL., Trustees

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Massachusetts (R. 13–17) is reported in 7 F. Supp. 915. The opinion of the Circuit Court of Appeals (R. 21–25) is reported in 76 F. (2d) 200.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the judgment of the District Court was entered March 9, 1935 (R. 25). Petition for writ of certiorari was filed June 7, 1935, and was granted

October 14, 1935 (R. 25). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The respondents sold stock which they had received as residuary legatees of the decedent more than two years after the date of the death of the decedent but within two years of the date of the distribution of such stock to the respondents as residuary legatees. Was the stock "held" by the respondents for more than two years, so that the gain on the sale thereof is taxable as a "capital net gain" within the meaning of Section 101 of the Revenue Act of 1928?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*, pp. 9–15.

STATEMENT

This is an action by the respondents as trustees under the will of the decedent to recover additional income tax assessed against them for the year 1928. The facts were stipulated (R. 4–6) and as found by the District Court (R. 11–12) may be summarized as follows:

Edward E. Blodgett of Newton, Massachusetts, died April 4, 1926 (R. 5), leaving a will (R. 5, 7) by the terms of which *inter alia* he devised the residue of his estate to the respondents in trust.

The decedent's will was duly probated, and the widow of the decedent qualified as executrix of the will. The respondents filed on March 15, 1929,[1] with the Collector of Internal Revenue at Boston, Massachusetts, income-tax returns as trustees with respect to the income of the trust estate for the calendar year 1928. The amount of the tax shown to be due was duly paid to the then Collector of Internal Revenue at Boston, Massachusetts, who, in turn, paid it over to the United States. (R. 5.)

Thereafter, on March 21, 1931, within the time allowed by law, the Commissioner of Internal Revenue assessed against the respondents an additional income tax for the year 1928 in the amount of $4,500.26 with interest of $544.47, which amounts, in the total sum of $5,044.73, were paid April 3, 1931, to the then Collector of Internal Revenue, who duly covered them into the Treasury of the United States. (R. 5.)

Part of such additional assessment was based upon the following action of the Commissioner of Internal Revenue (R. 5–6):

> The transfer by the Commissioner from capital net gain to ordinary income of the sum of $74,773.08. This sum represented the profit realized by the petitioners [the respondents] from the sale in 1928 of certain securities belonging to the trust estate. These securities had all been the property

[1] The stipulation (Par. 3) sets this date as 1928, but this is an obvious error.

of the decedent and a part of his estate at the time of his death, which was more than two years before the date of sale, but they had been received by the petitioners from the executors as a part of the petitioners' share as residuary legatees within two years from the date of sale. The basis used in determining the amount of the profit, both by the petitioners and by the Commissioner, was the fair market value of such property on the date it was transferred by the executors to the petitioners, in accordance with Section 113 (a) (5) of the Revenue Act of 1928.

After due claim for refund had been filed by the respondents with the Collector of Internal Revenue on July 29, 1931, and rejected by the Commissioner of Internal Revenue on January 22, 1932 (R. 6), the respondents instituted these proceedings in the District Court for recovery of the full amount of the additional assessment.

The District Court sustained the action of the Commissioner in transferring from capital net gain to ordinary income the sum of $74,773.08, which represented the profit realized by the respondents from the sale in 1928 of certain securities belonging to the trust estate. Judgment on that point for the United States was accordingly entered by the District Court (R. 11–12). The only question presented to the Circuit Court of Appeals was whether the item of $74,773.08 should be taxed

as capital net gain or as ordinary income. That court reversed the District Court, holding that the respondents were to be considered as having held the securities in question from the date of the death of the decedent, and that such date being more than two years prior to the respondents' sale of the securities, the securities were in their hands "capital assets" and the gain "capital net gain."

SPECIFICATION OF ERRORS TO BE URGED

The United States urges that the Circuit Court of Appeals erred:

1. In holding that the respondents, as residuary legatees receiving personal property upon distribution of the decedent's estate, were to be deemed to have held such property from the date of the decedent's death for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*.

2. In failing and refusing to hold that for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*, the respondents, as residuary legatees, should be deemed to have held personal property received upon distribution of the decedent's estate only from the date of actual distribution to the respondents.

3. In reversing the judgment of the District Court and remanding the case.

ARGUMENT

Section 101 (c) (8) of the Revenue Act of 1928, *infra*, provides that at the election of the taxpayer the tax on net gains from the sale of capital assets may be taxed at 12½ percent (instead of at the ordinary normal and surtax rates) and defines the term "capital assets" as "property *held by the taxpayer* for more than two years." (Italics supplied.) It is further provided that in determining the period for which the taxpayer has held property there shall be included the period for which the property was held by any other person if under Section 113 the basis for determining gain or loss on a sale of the property in the hands of the taxpayer is the same as it would have been in the hands of such other person. (Subdivision (c) (8) (B), *infra*.) Section 113 (a) of the Revenue Act of 1928, *infra*, so far as material here, provides that the basis for determining gain or loss on a sale of property *acquired* after February 28, 1913, shall be the cost thereof, with certain exceptions. Subdivision (a) (2) provides generally that if the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor. Under subdivisions (a) (5) the basis prescribed for real property acquired by general or specific devise or intestacy, and of personal property acquired by an estate from the decedent, is the value thereof at the date of decedent's death. In all

other cases of property acquired either by will or intestacy, however, which include general or residuary bequests, the basis specified is the value of the property *at the time of the distribution to the taxpayer.*

The securities here in question, from the sale of which the respondents realized a profit of $74,773.08, were distributed to the respondents as residuary legatees and were sold by the respondents less than two years after the date of distribution to them but more than two years after the decedent's death.

This case presents essentially the same question involved in *Helvering* v. *Lee,* No. 111, October Term, 1935; *Ogle* v. *Helvering,* No. 137, October Term, 1935; *Dibblee* v. *Helvering,* No. 494, October Term, 1935; and *Rand* v. *Helvering,* No. 439, October Term, 1935, now pending before this Court. In *Ogle* v. *Helvering, supra,* and *Rand* v. *Helvering, supra,* the taxpayers took under intestacy laws, whereas in the instant case and *Helvering* v. *Lee, supra,* the taxpayers were residuary legatees, and in *Dibblee* v. *Helvering, supra,* the taxpayer was a general legatee, but the question presented in all five cases is whether personal property of a decedent passing otherwise than by specific bequest may be considered to have been held by the recipient during any period prior to actual distribution for the purpose of satisfying the more than two-year requirement of Section 101 (c) (8) of the Revenue Act of 1928, *infra.*

McFeely v. *Helvering*, No. 24, October Term, 1935, pending before this Court, presents essentially the same question, although the facts are different, in that the taxpayer there was the donee of a widow who had elected under the laws of Pennsylvania to take against the will of her deceased husband. In the interest of brevity the petitioner adopts and incorporates herein by reference the argument presented in the brief filed on behalf of the respondent in *McFeely* v. *Helvering, supra*.

CONCLUSION

We respectfully submit that the decision of the court below was erroneous and should be reversed.

Respectfully submitted

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
JOHN MACC. HUDSON,
BERRYMAN GREEN,
Special Assistants to the Attorney General.

OCTOBER, 1935.

APPENDIX

REVENUE ACT OF 1928, C. 852, 45 STAT. 791, 811, 815, 818

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property ac-

quired after February 28, 1913, shall be the cost of such property;

* * * * *

(2) Gift after December 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) Transfer in Trust after December 31, 1920.—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the

death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *.

TREASURY REGULATIONS 74

ART. 596. *Property transmitted at death.*—In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28,

1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be

deemed to be its fair market value at the time of the death of the decedent.

S. REP. 960, 70TH CONG., 1ST SESS. (P. 26)

Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 110.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

THE FIRST NATIONAL BANK OF BOSTON ET AL.,
Trustees Under the Will of Edward E. Blodgett,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1935.

No. 110.

THE UNITED STATES OF AMERICA,
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TRUSTEES UNDER THE WILL OF EDWARD E. BLODGETT,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the District Court (R. 13–17) is reported in 7 Fed. Supp. 915, and the opinion of the Circuit Court of Appeals (R. 21–25) in 76 Fed. (2) 200.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 9, 1935 (R. 25). The petition for writ of certiorari was filed June 7, 1935, and granted October 14, 1935.

STATEMENT OF THE CASE.

The Respondents (hereinafter for convenience usually called the taxpayers) are residuary legatees under the will of Edward E. Blodgett, late of Massachusetts, who died April 4, 1926. As such residuary legatees, they received, before April 4, 1928, as a part of their share of the estate, certain securities, all of which had been the property of the decedent and a part of his estate at the time of his death. These securities were sold by them between April 4 and December 31, 1928,—more than two years after the decedent's death, but less than two years after the date when they were distributed to them by the Executors.

The controversy arises over the action of the Commissioner of Internal Revenue in transferring from capital net gain to ordinary income subject to normal and surtaxes the sum of $74,773.08. This sum represented the amount of the gain realized by the Trustees from the sale of the securities referred to above. The amount of the gain was computed in accordance with the provisions of §113 (a) (5) of the Revenue Act of 1928, and there is no question as to the correctness of that computation.

The only question involved here is whether these securities came within the definition of "capital assets" under §101 (c) (8) of the Revenue Act of 1928 as "property held by the taxpayer for more than two years".

The taxpayers contend that, since personal property of a decedent which is received by a residuary legatee

is acquired by such legatee at the date of the decedent's death (*Brewster* v. *Gage*, 280 U. S. 327), it follows that the property was held by the taxpayers for more than two years.

The Government contends that, since Congress in another section of the Revenue Act of 1928 changed the residuary legatee's base date for the purpose of computing the amount of his gain or loss on the sale of such property from the time of his acquisition of such property to the time of the distribution of such property to him by the executors (§113 (a) (5)), such property was not held by the taxpayers for more than two years within the meaning of §101(c) (8) of that Act.

STATUTES INVOLVED.

Revenue Act of 1928.

"SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in Case of Capital Net Gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain. . . .

(c) *Definitions.*—For the purposes of this title—

(1) 'Capital gain' means taxable gain from the sale of exchange of capital assets consummated after December 31, 1921. . . .

(5) 'Capital net gain' means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains. . . .

(8) 'Capital assets' means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property or a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which

the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112(g) of this title or under the provisions of section 203(c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution."

"SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property Acquired After February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition or property acquired after February 28, 1913, shall be the cost of such property; except that— . . .

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. . . ."

SUMMARY OF TAXPAYERS' ARGUMENT.

1. In the absence of clear language in the statute to the contrary, property must be deemed to have been "held by" a taxpayer at least from the time when he acquired it.

2. It was settled by *Brewster* v. *Gage*, 280 U. S. 327, that a residuary legatee "acquired" at the date of the decedent's death such of the decedent's securities as he received as a part of his distributive share of the estate.

3. The words "capital assets" in the capital net gain section of each of the prior Revenue Acts (the Acts of 1921, 1924, and 1926) were defined, as in the 1928 Act, as "property held by the taxpayer for more than two years."*

4. Under the uniform administrative construction of that section by the Revenue Department prior to the 1928 Act, property of a decedent received by a legatee-taxpayer was deemed to have been "held by the taxpayer" from the date of the decedent's death for the purpose of the definition of "capital assets" in the capital net gain section.

5. The reenactment of that definition of "capital assets" without change in the Revenue Act of 1928 must be held "to indicate Congressional approval of this administrative interpretation". (*Helvering* v. *Bliss*, 293 U. S. 144).

6. § 113 (a) (5) of the Revenue Act of 1928 (the section on which the Government relies in this case) mere-

* (The 1921 Act defined such assets as "property *acquired and* held by the taxpayer for more than two years, but it is obvious that the words "acquired and" were mere surplusage.)

ly fixes an arbitrary base date for the purpose of computing the *amount* of a taxpayer's gain or loss from the sale of property "acquired by will or intestacy", and its language is such as to make it clear that the arbitrary base date in the case of a residuary legatee of personal property is "the time of distribution" of such property to the taxpayer, rather than "the time of acquisition" of such property by the taxpayer as the corresponding section of the prior Revenue Acts had provided.

7. If Congress had intended by such section to establish it as the law that the date of distribution to the residuary legatee should be deemed to be his date of acquisition for the purpose of the entire Revenue Act, or even for the purpose of that section, it could easily have chosen apt words to make that intent clear. On the contrary, however, the words used by it in that section, when read in the light of the words used in the corresponding section of the prior Acts, tend to indicate that Congress were merely choosing the date of distribution rather than the date of acquisition as the arbitrary base date for the purpose of that one section.

8. There was nothing new in fixing an arbitrary date rather than the taxpayer's acquisition date as the base date to be used in computing gain or loss (see subdivisions (1), (2), (3), (4), and (6) of § 113 (2) of the 1928 Act and the corresponding sections of the prior Acts).

9. Nothing in the case of *Helvering* v. *New York Trust Company*, 292 U. S. 455, supports the Government's contention in the case at bar, for in that case the question was one of adding another's tenure to the

taxpayer's tenure,—something which is consistent with the cardinal principle that taxing acts should be construed in favor of the taxpayer,—whereas in the case at bar, the question is whether the taxpayer's tenure for the purpose of the capital net gain section is to be cut down to something less than the plain language of that section calls for—something which would be inconsistent with that cardinal principle.

10. *Helvering* v. *Bliss,* 293 U. S. 144, rather than *Helvering* v. *New York Trust Company,* 292 U. S. 455, is controlling in the case at bar, for in the *Bliss* case, as in the case at bar, the question was whether the amendment of one section of the Revenue Act should be construed as having the effect of changing the meaning, as theretofore established by a uniform administrative construction, of another section of that Act which had been reenacted without change, whereas in the *New York Trust Company* case the question was whether an amendment of the very section, the construction of which was the issue involved in that case, operated to change the meaning of that section or merely to declare its meaning. In the case at bar we have no such issue as that in the *New York Trust Company* case.

ARGUMENT.

I.

It should be axiomatic and need no argument that a person holds property at least from the time he acquires it. Therefore the next question is,—when does a residuary legatee "acquire" property of the decedent that comes to him as such residuary legatee?

II.

This proposition was settled by *Brewster* v. *Gage*, 280 U. S. 327. The question involved in that case was whether, in calculating the amount of gain realized or loss sustained by a legatee upon the sale by him of securities which had been a part of the decedent's property at his death, the legatee's cost basis should be the value of those securities at the date of the death or their value at the date of the decree of distribution. The sales were made in 1920, 1921 and 1922, and Acts involved were the 1918 and 1921 Acts. The governing provision of the 1918 Act was as follows:

> "Section 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—
>
> (1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and
>
> (2) In the case of property acquired on or after that date, the cost thereof; . . ."

The governing provision of the 1921 Act was as follows:

"Section 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

(3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition . . ."

It thus appears that this Court (and it so stated at page 333 in its opinion), was construing the word "acquired" in the 1918 Act and the phrase "at the time of such acquisition" in the 1921 Act as to property of a decedent received by a general legatee. There were no other words or phrases in either Act which qualified the terms in question, and therefore the only question before the Court was the single one,—when, as a matter of general law, does a residuary legatee "acquire" the decedent's property?

This Court held that the legatee "acquired" such property at the death of the testator. He "acquired" it then because there then vested in him "the right" to so much of that property as shall remain after proper administration and "the right" to have it delivered upon entry of the decree of distribution. Although the legal title to it vests in the executors as of the death, "it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the

death." The legatees' right to have this property "vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property."

This Court's decision was consistent with the Massachusetts law as shown by the following excerpts from Massachusetts cases.

> "All the personal property of a testator vests in his executor by the probate of the will. It is sometimes said that an executor holds as trustee for the legatees. But all that is meant by that is that he holds title to his testator's goods in *autre droit* (*Weeks* v. *Gibbs*, 9 Mass. 74, 75, 76), and not in his own right. The right of those for whom he holds is a legal not on equitable right, and is enforced by an action at law." *Lathrop* v. *Merrill*, 207 Mass. 6, 10.
>
> "The right to a distributive share is a vested interest, and although the settlement of the estate be delayed, and a decree of distribution postponed, yet the decree of distribution, when made, relates back to the time of the decease of the intestate, and apportions the estate to the persons then entitled, or their representatives." Shaw, C. J., in *Davis* v. *Newton*, 6 Met. 537, at 541.

III–IV.

Let us look at the situation that confronted Congress when it enacted the 1928 Act. The capital net gain section had been in the prior Revenue Acts of 1921, 1924 and 1926. The definition of "capital assets" in that section as being "property held by the taxpayer for more than two years" had remained unchanged in that

respect. There had been amendments of that section by which there had been added to the period during which the taxpayer had held the property sold, certainly additional periods such as the period during which the taxpayer had held other property into which the property in question had been converted or for which it had been exchanged, and such as the periods during which certain other persons such as donors had held the property.

The uniform administrative construction of that definition as applied to general and residuary legatees had been that they *"held"* from the time of the decedent's death such of the decedent's property as they received in distribution of the estate.

I. T. 1719 issued in October 1923 (C. B. II-2, 45).

Letter of Commissioner to Prentice Hall, Inc. of December 7, 1923 (P-H. Tax Serv. 1923, pages 2703-4).

I. T. 1889 issued in January 1924 (C. B. III-1, 70).

In I. T. 1889 (which, by the way, has never been revoked or modified by the Revenue Department) the Revenue Department ruled that where a general legatee sold in 1922 certain securities, formerly owned by the testator who had died in 1919, which the legatee had received in 1921 as a part of his distributive share of the estate, such legatee had acquired such property at the date of the testator's death and that he therefore had "held the property for more than two years" under the provisions of the capital net gain section (s. 206) of the Revenue Act of 1921. This conclusion was

reached *not* because that happened to be the base date for computing the amount of the taxpayer's gain *but primarily because* that was the date when, in the opinion of the Revenue Department (which was later confirmed by the *Brewster* case), the taxpayer, as a matter of general law, had *acquired* the property.

Another reason given in I. T. 1889 for this conclusion was there stated as follows:

> "That Congress did not intend to require legal title and possession by the use of the terms 'acquired and held' in defining 'capital assets' is strongly indicated by subdivision (c) of section 206, stating the method for the application of the section to cases of partnerships, estates, or trusts. The subdivision provides:
>
> [The quotation of this subdivision is omitted because it appears in the full text of this I. T. in the appendix of this brief.]

These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section 206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. *If the phrase 'property acquired and held by the taxpayer' in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (c) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned.* Since the section should be construed so as to give effect to both provisions, rather than merely one (*Monroe Co.* v. *Riordan,* 280 Fed. 624, 626), it appears that Congress did not intend the words 'property acquired and held by the taxpayer' to refer exclusively to legal property interests; but

that beneficial interests in property are also included. Moreover, according to the doctrine of the cases quoted *supra*, a distributee of a decedent's estate has in interest vesting at the decedent's death analogous to that of a cestui que trust; section 206(c) expressly grants to a cestui the privilege of determining his tax in the manner provided by that section; accordingly, the distributee should be accorded a like privilege." (Italics ours.)

The significance of the foregoing reason is that the subdivision (c) of section 206 of the 1921 Act there referred to now appears, with no material change, as Section 168 of the 1928 Act.*

V.

In the face of that uniform administrative construction of the capital net gain section, which had continued openly and publicly for about five years, Congress reenacted the definition of "capital assets" without any material change whatsoever. This reenactment of that section under such circumstances must be held "to indicate Congressional approval of this administrative interpretation."

Helvering v. *Bliss*, 293 U. S. 144.

(It is to be noted that the only rulings which had been made to evidence such uniform administrative construction in that case were a telegram published in a tax service, an I. T. and a Mim.)

Furthermore it is to be noted that, although Congress

* (The only change, which change first appeared in the 1924 Act, was that the words at the beginning of the paragraph, "In the case of a partnership or of an estate or trust", were changed to read, "In the case of the members of a partnership, of an estate or trust, or of the beneficiary of an estate or trust, . . ."

had previously deemed it necessary to insert specific provisions in the capital net gain section providing for addition of tenures to the taxpayer's own tenure where he was required to use an earlier date as his base date for the purpose of computing the amount of his gain or loss (see subdivisions (A), (B) and (C) of Section 101 (c) (8) of the 1928 Act, and the corresponding provisions in the 1926 Act), nevertheless Congress made no change in the capital net gain section in the 1928 Act as to a general or residuary legatee to indicate that Congress intended to require that such legatee be deemed to hold his property for the purpose of the capital net gain section (§101) only from the date it was distributed to him (his new arbitrary base date for the purpose of computing the amount of his gain), rather than the date when, under the prior uniform administrative construction of §101, he acquired it.

VI–VII.

Even though Congress in the cost basis section (Section 113 (a) (5) of the 1928 Act) changed the base date as to general legatees, there is nothing to indicate that it intended to declare that such new base date should be deemed, for the purposes of the Act, to be the legatee's acquisition date. On the contrary, it seems clear that it intended to fix an arbitrary base date which it recognized was not the same as the acquisition date.

1. The very fact that Congress used the phrase "time of *distribution* to the taxpayer" in the same sentence, and in connection with, the phrase "acquired either by will or by intestacy," particularly when considered in the light of the language of the corresponding cost basis provision in the prior Acts, indicates clearly that Con-

gress purposely used the phrase "time of distribution" in contradistinction to the phrase "time of acquisition".

2. In the case of specific bequests of personal property, it fixed the base date as "the time of the death of the decedent," and yet the situation as to legal title is exactly the same here as in the case of a general or residuary bequest. In each case the legal title during the period of administration is in the executor, although in *autre droit,* for benefit of the legatee.

3. If Congress had intended that for the purposes of the Act *generally* such a legatee or distributee should be deemed to have "acquired" such property at the time of its distribution to him rather than at the date of death, it could not have so provided in simple terms and made such intent unmistakably clear. Indeed, it behooved Congress to make such intention plain by the use of appropriate language, in view of the uniform administrative practice of the Department in treating a legatee as having "held" property of the decedent from the date of the death for the purpose of the capital gain section.

There was nothing new in fixing an arbitrary date rather than the taxpayer's acquisition date as the base date to be used in computing gain or loss. In subdivisions (1), (2), (3), (4) and (6) of section 113 (a) of the 1928 Act, and in the corresponding provisions of the prior Acts, such arbitrary dates were fixed as March 1, 1913, the donor's acquisition date in a case where the donee's gain or loss was to be computed, the date when the taxpayer acquired other property into which the property sold by the taxpayer had been converted or for which it had been exchanged, and other arbitrary dates.

IX–X.

The Government, in its Brief, places great reliance upon the case of *Helvering* v. *New York Trust Company*, 292 U. S. 455. We submit, however, that such reliance is based upon a misconception of the holding and import of that case.

The question there involved was whether Congress, in amending the capital net gain section by adding by the 1926 Act to the definition of "capital assets" the sentences which now appear as subdivisions (A), (B), and (C) of section 101(c) (8) of the 1928 Act, thereby changed or merely declared the meaning of that definition. The specific question was whether a donee was entitled under the 1921 Act to the benefit of the capital gain section of that Act simply because he was required by the cost basis section of that Act to use his donor's acquisition date as his own base date for the purpose of computing the amount of his gain or loss, and this Court (three Justices dissenting) held that he was so entitled.

An examination of the opinion will disclose that apparently the principal reasons for this conclusion on the part of the majority of this Court were that the legislative purpose to be served by the application of the lower rate upon capital gains was directly opposed to the Commissioner's construction; that a donee taxpayer who was required to take his donor's base date for the purpose of computing the amount of his gain would be discriminated against if he could not also use that donor's base date for the purpose of bringing himself within the benefit of the capital net gain sec-

tion; and that it was to be inferred that Congress did not intend penalization of that sort.

No such situation exists in the case at bar. The legatee's base date for computing the amount of his gain is arbitrarily fixed at a date later than his acquisition date. He is claiming that it is not to be inferred that he is thereby to be deprived of the benefit of the capital net gain section in the absence of plain language to that effect. We do not have a situation in the case at bar where, unless the change in base date is to be inferred to change the taxpayer's acquisition date, he will be discriminated against or penalized.

It is a well recognized canon of statutory construction that taxing acts are not to be extended by implication beyond the clear import of the language used where such implication would be against the interests of the taxpayer. In taxing statutes "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail". "Unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify law by construction."

Crooks v. *Harrelson,* 282 U. S. 55.
See also *United States* v. *Merriam,* 263 U. S. 179, 187–8.

By the plain language of the capital net gain section the taxpayers in the case at bar come within that section, having "held the property for more than two

years". As said by this Court in *Old Colony Railroad* v. *Commissioner*, 284 U. S. 552, at 560:

> "The legislature must be presumed to use words in their known and ordinary signification. The popular or received import of words furnishes the general rule for interpretation of public laws . . . This rule is applied to taxing acts."

In ordinary parlance a person holds something from the time he acquires it; and it is a principle of general law, as settled by the *Brewster* case, that a residuary legatee acquires the decedent's property at the death of the decedent.

The situation in the case at bar is, therefore, just the opposite from the one in the *New York Trust Company* case. In the case at bar the taxpayers come clearly within the plain language of the capital net gain section, and the Government is claiming that, because of an amendment to another section, it is to be inferred that Congress intended to take the taxpayers out of the capital net gain section and make them taxable under a different section which imposes a greater tax burden.

In the *New York Trust Company* case the taxpayer could not bring himself within the plain language of the capital net gain section, but claimed that it was to be inferred that he could do so because of the provisions of another section. He so claimed because Congress, by a later amendment of the capital gain section, had made it clearly include taxpayers in the same situation as he had been, and also because without such an inference he was being discriminated against and penalized.

Obviously, therefore, the situations in the two cases

are radically different. Certainly there is nothing in the *New York Trust Company* case to indicate that a taxpayer is to be subjected, merely by inference, to a greater tax burden, particularly where there has been no subsequent amendment of the capital net gain section which could be held declaratory to the effect that such an inference should be drawn.

AS TO SOME OF THE ARGUMENTS IN THE GOVERNMENT'S BRIEF.

(As the Government's brief in the McFeely case, the argument in which it is adopting in the case at bar, was only received by the taxpayer's attorney about noon of October 17, and the taxpayer's brief had to go to the printer by the morning of October 18, obviously there has not been sufficient time to deal fully with the Government's arguments, and it is not to be inferred that the arguments or statements in that brief which are not answered are to be considered as acquiesced in or admitted by the taxpayers.)

It is perfectly true as pointed out in the Government's brief (Br. 24–25), that the *Brewster* case "must be read in the light of the facts presented and the statutes involved." The Court was there concerned with the base date for determining gain or loss on property sold by a residuary legatee. The Government's argument as to the effect of that case, however, loses sight of the fact that in order to determine that base date it necessarily had to settle the question as to when, as a matter of general law, the residuary legatee "acquired" such property, for the language of the statute merely pro-

vided that the base date of a legatee should be his date "of acquisition",—the date when he "acquired" it.

The Government's brief then proceeds with its argument on the theory that, if the statute had established value at the time of distribution as the basis of calculation in respect of sales by a legatee, this Court would have held that such date was the date when the legatee "acquired" the property, or that such date was his date "of acquisition". Such a line of argument is obviously fallacious.

Similarly, the argument of the Government based upon the last paragraph of the opinion in the *Brewster* case (quoted by the Government at Br. 26) gives an erroneous effect to that paragraph and leads the Government to the erroneous conclusion (Br. 27) that the *Brewster* case directly supports the Government's position. The paragraph does nothing more than merely point out that Congress, by § 113 (a) (5) of the Revenue Act of 1928, merely changed the law as to the base date to be used in determining the amount of gain or loss in the case of residuary and general legatees. There is nothing whatsoever in that paragraph to indicate that the 1928 Act changed the law as to the date of acquisition in the case of a residuary legatee. On the contrary, a reading of that paragraph in the light of the rest of the opinion indicates that the "change of law" intended was a change of law as to the base date to be used, changing that date from the date of acquisition to the date of distribution, and not a change in law as to a residuary legatee's date of acquisition.

Again, at page 15, the Government says:

> "Under the earlier statutes confusion arose as to the meaning of the general language, 'date of acquisition,' employed in fixing the basis of property acquired by a decedent by general and residuary legatees. It was to settle this confusion that Congress in the 1928 Act, adopted prior to the decision in *Brewster* v. *Gage, supra,* specifically fixed, without regard for technical rules as to the vesting of titles, the dates of acquisition for income tax purposes of property acquired from a decedent in various ways. Section 113 (a) (5), *infra,* in fixing the date of distribution as the basis of property acquired from a decedent by will, other than specific bequests, and by intestacy, plainly establishes that date as the time of acquisition of the property for income tax purposes."

There is no warrant in the language of that section of the 1928 Act for such a conclusion that Congress was fixing such a legatee's "date of acquisition" or "time of acquisition". It purported to do nothing more than many of the other parts of section 113 did, *i. e.,* to fix an arbitrary date which had no relation to the taxpayer's acquisition date, as the base date to be used in determining the amount of the taxpayer's gain or loss: as to property acquired by a taxpayer before March 1, 1913, the base date was fixed as March 1, 1913; as to property acquired by a taxpayer by gift the donor's acquisition date was to be used in certain instances; and so on.

The same fallacious position was taken at Br. 16 where it says:

> "The statute having prescribed what shall be

deemed the date of acquisition of personal property by a residuary or general legatee . . ."

CONCLUSION.

Wherefore, the taxpayers respectfully submit that they are entitled to have their gain taxed under the capital net gain section rather as ordinary income subject to the normal and surtaxes. They are so entitled under the ordinary meaning of the plain language of that section as established by the uniform administrative construction of that language for at least five years prior to the reenactment of that same language without change in the 1928 Act. (*Helvering* v. *Bliss, supra.*) They are not to be deprived of that right solely because a separate section which dealt solely with the method of computing the amount of the gain was amended so as to fix an arbitrary base date which was different from the taxpayer's acquisition date.

It is one thing for the Court to liberally construe a tax provision, which was enacted for the benefit of taxpayers, so as to permit a taxpayer who did not come within its literal terms to have the benefit of it. It is quite a different proposition for a Court to so construe such a tax provision as to deny the benefit of that provision to a taxpayer who can bring himself within its literal terms, where the only reason which can be advanced for depriving him of that benefit is that Congress changed another tax provision, especially where the taxpayer's right to the benefit of the first tax provision had theretofore been in no way dependent upon the provision now changed.

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

GEORGE S. FULLER,

Attorney for the Respondents.

October, 1935.

APPENDIX.

(The following is the full text of I. T. 1889 (III C. B.-1, pp. 70–72) as it appeared in the Internal Revenue Bulletin published by the Treasury Department, Bureau of Internal Revenue.)

REVENUE ACT OF 1921.

"In the case of a taxpayer who received property under the terms of a will, the two-year period during which the assets must be held to entitle the taxpayer to the benefit of the provisions of section 206 runs from the date of the testator's death."

Advice is requested in regard to the Federal income tax liability arising from the sale by the taxpayer in 1922 of certain securities which he received in 1921 as part of his distributable share of the estate of his father, who died in 1919.

The particular question raised is whether the two-year period during which capital assets must be held to entitle the taxpayer to the benefit of the provisions of section 206 of the Revenue Act of 1921 ran from the date of the testator's death or from the later date on which the beneficiary actually received possession of the securities.

The question requires a determination of the meaning of that part of section 206(a) 6, which provides:

"The term 'capital assets' as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years. . . ."

It is well settled that the interest of a distributee of a decedent's estate attaches upon the date of the decedent's death. Mr. Jusice Holmes thus states the rule in *Hooper* v. *Bradford* (1901) (178 Mass., 95, 97):

> "The time when the property passes under a deed is not later than the death of the grantor. The same is true in the case of a will. It is true that in the later instance the interest of a legatee is subject to an account, but still it is an interest in the fund as it is, analogous to that of a *cestui que trust,* and vests at the death of the testator."

To the same effect is *Mechanics' Savings Bank* v. *White* (1889) (150 Mass. 234). The rule is the same in the case of intestacy, according to *Perryman* v. *Green* (1863, (39 Ala., 133):

> "The right of a distributee attaches upon the death of the intestate. The interest then accrues, and the subsequent division serves to ascertain and define, convert into a legal right, and reduce to possession, an equity which existed before in the form of a *chose* in *action,* cognizable in chancery."

In an article in 21 Harvard Law Review, 436, the result of the authorities is thus summarized:

> ". . . Neither an executor nor an administrator takes any beneficial interest in the decedent's property. And on the death of the testator or intestate, both legatees and next of kin get an immediate interest in the personal estate analogous to that of a *cestui que trust.*"

The Department has adopted this doctrine in regulations and rulings, holding that a distributee of property from a decedent's estate acquires it at the date of the

decedent's death for the purpose of determining gain or loss from its sale by such distributee. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34.)

Granted, then, that a distributee acquires an immediate interest in the decedent's estate at the date of the decedent's death, and that this interest is analogous to that of a *cestui que trust,* is this interest "property acquired and held by the taxpayer" from the time of the death? In other words, does the quoted phrase embrace simply legal interests in possession, or does it further embrace the beneficial interest of a distributee, which later is converted into a legal interest by the actual distribution?

That Congress did not intend to require legal title and possession by the use of the terms "acquired and held" in defining capital assets is strongly indicated by subdivision (c) of section 206, stating the method for the application of the section to cases of partnerships, estates, or trusts. The subdivision provides:

> "In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section."

These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section

206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. If the phrase "property acquired and held by the taxpayer" in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (c) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned. Since the section should be construed so as to give effect to both provisions rather than merely one (*Monroe Co.* v. *Riordan* (1922) (280 Fed., 624, 626)), it appears that Congress did not intend the words "property acquired and held by the taxpayer" to refer exclusively to legal property interests; but that beneficial interests in property are also included. Moreover, according to the doctrine of the cases quoted *supra,* a distributee of a decedent's estate has an interest vesting at the decedent's death analogous to that of a *cestui que trust;* section 206(c) expressly grants to a *cestui* the privilege of determining his tax in the manner provided by that section; accordingly, the distributee should be accorded a like privilege.

Further, in view of the express purpose for enacting the section, it is very unlikely that Congress intended to distinguish between legal and beneficial interests in its application. It is well known that section 206 was adopted to provide relief for taxpayers who realize in a single year a gain accumulated over several years (see notes on the Revenue Act of 1918, pp. 15–16; report from Committee on Ways and Means, dated August 16, 1921; p. 10; report from Finance Committee, dated September 26, 1921, p. 12). The reason for the enactment is directly applicable to the instant case. The property

in question was acquired by the taxpayer under the regulations at the date of the testator's death; the gain resulting from its sale is one accumulated over more than two years, during all of which time it has been retained for the taxpayer. The fact that during part of that period an executor or administrator was in possession of the property should not affect the result, since the taxpayer acquired the property at the testator's death, and thereafter the beneficial ownership was in him.

Moreover, the Department has adopted the view, both in the regulations and in its rulings, that the phrase "acquired and held by the taxpayer" does not require actual possession of the assets in all cases. Article 1651 of Regulations 62 provides in part:

> ". . . The specific property sold or exchanged must have been held for more than two years, but in the case of a stock dividend the prescribed period applies to the original stock and the stock received as a dividend considered as a unit and where property is exchanged for other property and no gain or loss recognized under the provisions of section 202, the prescribed period applies to the property exchanged and the property received in exchange considered as a unit. . . ."

In neither of these cases would the taxpayer have had possession during the two-year period of the specific property disposed of, although the identity of the particular investment during that time would be sufficiently established. In I. T. 1660 (C. B. II-1, 36), in which the exact question herein has been considered by the Unit, it has been held that the two-year period provided in

section 206(a) 6 begins to run on the date of the decedent's death.

Finally, as stated above, it is well settled that for the purpose of computing gain or loss from the sale by the beneficiary of property acquired by bequest, devise, or inheritance, the property is acquired by the beneficiary as of the date of the decedent's death. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34.) Hence, in the instant case, the taxpayer acquires the securities at the date of the decedent's death; and that particular investment has been kept intact as the taxpayer's from that date to the date of sale, a period of more than two years. The gain thereby realized represents an accumulation over a period of more than two years. In view of the indications within the section itself that a taxpayer possessing a beneficial interest in property may have the benefit of its provisions, and of the construction placed upon the section by the regulations and rulings, it is held that the taxpayer herein is entitled to compute his tax with reference to the gain on the sale of the securities here in question on the basis provided in section 206.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 111

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

FRANCES G. LEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 111

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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1 [Caption omitted.]

Before United States Board of Tax Appeals

Docket No. 65705

FRANCES G. LEE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:

For petitioner: Hugh W. McCulloch, Esq.
For respondent: Harold Allen, Esq.

Docket entries

1932

May 6—Petition received and filed. Taxpayer notified. (Fee paid.)
May 6—Copy of petition served on general counsel.
June 10—Answer filed by general counsel.
July 23—Copy of answer served on taxpayer—general calendar.

1933

Aug. 30—Hearing set Oct. 31, 1933.
2 Sept. 13—Motion for circuit hearing at Chicago filed by taxpayer.
9/14/33 denied.
Oct. 31—Hearing had before Mr. Chas. P. Smith, division 5. Submitted on merits. Stipulation of facts (1) filed.
Nov. 14—Transcript of hearing Oct. 31, 1933, filed.

1934

Feb. 20—Memorandum opinion rendered—Charles P. Smith, division 5. Judgment will be entered under rule 50.
Mar. 14—Notice of settlement filed by general counsel.
Mar. 17—Hearing set April 4, 1934.
Mar. 22—Consent to settlement filed by taxpayer.
Mar. 29—Decision entered—Charles P. Smith, division 5.
June 6—Petition for review by U. S. Circuit Court of Appeals, 1st Circuit, with assignments of error filed by taxpayer.
June 6—Praecipe filed.
June 9—Proof of service of petition and praecipe filed by taxpayer.
June 21—Agreed statement of evidence lodged.
July 3—Supplemental praecipe filed by taxpayer.
July 7—Proof of service of supplemental praecipe filed.
July 26—Supplemental praecipe filed by taxpayer—proof of service thereon.
Aug. 4—Order that time for transmission and delivery of record *sur* petition for review be extended to Sept. 15, 1934, entered.

Before United States Board of Tax Appeals

Petition

Filed May 6, 1932

Frances G. Lee hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:AR:B-1, JHC-60D, dated March 11, 1932, and as a basis for her appeal sets forth the following:

(a) The petitioner is a widow with no dependents, her residence is at Littleton, New Hampshire, and her business address is in care of R. M. Johnson, 606 South Michigan Avenue, Chicago, Illinois. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A", was mailed to the taxpayer on March 11, 1932. The tax in controversy is individual income tax for the year 1929 and is in the amount of forty thousand and eight hundred nineteen dollars and fifty-five cents ($40,819.55).

(b) The determination of tax set forth in said notice of deficiency is based upon the following errors:

1. The Commissioner has erroneously included in the net income of the petitioner subject to normal tax and surtax the sum of three hundred seventy-seven thousand, eight hundred sixty-six dollars and twelve cents ($377,886.12), the profit arising on the sale by the petitioner of 6,448 shares of stock of International Harvester Company and 300 rights to subscribe to shares of stock of the Commonwealth Edison Company which were "capital assets", the sale of which resulted in "capital gain" as defined in the Revenue Act of 1928.

2. The Commissioner has erroneously excluded from the amount of "capital net gain" of the petitioner subject to tax in the year 1929 said sum of three hundred seventy-seven thousand eight hundred sixty-six dollars and twelve cents ($377,866.12), the profit arising by reason of the sale of said securities enumerated above.

3. The Commissioner has erroneously held that said 6,448 shares of stock of International Harvester Company and 300 rights to subscribe to shares of stock of Commonwealth Edison Company sold by the petitioner in 1929 were not "capital assets."

(c) The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

1. On September 4, 1926, George B. Glessner, a resident of Littleton, New Hampshire, died, leaving a last will and testament which was duly admitted to probate. Under the provisions of the will of said decedent, the residue of his estate was given to your petitioner, Frances G. Lee, and as a portion of the residue of the estate of said George B. Glessner, your petitioner became the
4 owner of 1,550 shares of stock of the International Harvester Company, of the par value of $100 per share, and 300 shares of stock of the Commonwealth Edison Company; under the provi-

sions of the laws of New Hampshire, the title to said stock vested in your petitioner and she became the owner thereof on September 4, 1926. After September 4, 1926, by reason of the payment of stock dividends and the exchange of said stock of the International Harvester Company of $100 par value for stock of said company having no par value, the petitioner, as the owner of said 1,550 shares of stock of International Harvester Company of the par value of $100 per share, received 6,448 shares of the common stock of International Harvester Company having no par value.

2. Your petitioner sold said 6,448 shares of common stock of said International Harvester Company of no par value on the dates and for the net amounts hereafter set forth:

January 4, 1929, 948 shares	$93,787.38
January 25, 1929, 2,500 shares	248,985.00
March 5, 1929, 1,000 shares	110,710.00
September 3, 1929, 2,000 shares	273,195.00
Total net sale price, 6,448 shares	726,677.38

The basis for determining the gain arising upon the sale of said 6,448 shares of common stock of International Harvester Company is the market value of said stock on October 6, 1927, the date of the distribution of said stock to the petitioner, and that said market value of said stock on that date was $228.5625 per share for the 1,550 shares acquired by the petitioner under the will of said George B. Glessner, making the total value of the stock of International Harvester Company sold by the petitioner in 1929 the sum of three hundred fifty-four thousand two hundred seventy-one dollars and eighty-eight cents ($354,271.88), and the capital net gain arising from the sale of said stock is in the sum of three hundred seventy-two thousand four hundred five dollars and fifty cents ($372,405.50).

3. Your petitioner, as the owner of said 300 shares of stock
5 of Commonwealth Edison Company received by her under the provisions of the will of George B. Glessner, received on September 30, 1929, rights to subscribe to additional stock of said company, which were sold by your petitioner forthwith for the sum of nine thousand four hundred two dollars and eighteen cents ($9,402.18); that the basis for determining the gain arising upon the sale of said rights to purchase stock of the Commonwealth Edison Company was the market value of said stock on October 6, 1927, the date of the distribution of said stock to your petitioner. The market value of said stock on that date was one hundred sixty-three dollars ($163) a share, or a total of forty-eight thousand nine hundred dollars ($48,900); that the proper allocation of value of said rights issued on September 30, 1929, is 8.060453 percent of the value of said stock, and accordingly said rights should be valued in the sum of three thousand nine hundred forty-one dollars and fifty-six cents ($3,941.56) and the capital net gain arising from the sale of said rights is in the sum of five thousand four hundred sixty dollars and sixty-two cents ($5,460.62).

4.

The total net income of the petitioner for the year 1929 from all sources, including capital net gain, was	$655,570.70	
The capital net gain of the petitioner for the year 1929 included above, which the Commissioner concedes should be considered as capital net gain, was	222,828.68	
The capital net gain of the petitioner for the year 1929 included above in the total of the net income from all sources, arising from the sale of the stock of International Harvester Company referred to above, was	273,405.50	
And from the sale of rights of Commonwealth Edison Company, referred to above, was	5,460.62	
The total capital net gain of the petitioner in 1929 was		$600,694.80
The total net income of the petitioner in 1929 subject to surtax, was		54,875.90
The total amount of dividends received by the petitioner in 1929	$88,566.02	
The personal exemption was	1,500.00	
		90,066.02
		0
The balance of income subject to normal tax was		
Surtax on $54,875.90	3,642.63	
Tax at 12½ percent on capital net gain of $600,694.80	75,086.85	
Total tax		78,729.48
Less:		
Credit for earned income	4.38	
Income tax paid at source	73.80	
		78.18
Total tax assessable		78,651.30

5.

Your petitioner has paid, on account of income tax for the year 1929 believed to be due, the sum of	84,947.00
The total tax assessable as shown above is	78,651.30
Total amount of refund now due to the petitioner	6,295.70

Wherefore, your petitioner prays that this Board may hear the proceedings and determine that there is no deficiency of income tax due from the petitioner for the year 1929 and may determine that the petitioner is entitled to a refund of six thousand two hundred ninety-five dollars and seventy cents ($6,295.70) and interest thereon, the amount of overpayment made by your petitioner, upon the filing of said return.

FRANCES G. LEE.

7 Counsel:

HUGH W. MCCULLOCH,

857–231 South LaSalle Street, Chicago, Illinois.

[*Duly sworn to by Frances G. Lee, jurat omitted in printing.*]

Exhibit A to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Mar. 11, 1932.

MRS. FRANCES G. LEE,
(c/o R. M. Johnson),
606 South Michigan Avenue, Chicago, Illinois.

MADAM: You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $34,523.85, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges,
8 since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assesment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. WILMER,
Deputy Commissioner.

Enclosures: Statement. Form 882. Form 870.

STATEMENT

IT:AR:B-1 JHC-60D

In re: Mrs. Frances G. Lee, c/o R. M. Johnson, 606 South Michigan Avenue, Chicago, Illinois

Tax liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$119,470.85	$84,947.00	$34,523.85

The deficiency shown herein is based upon the report dated November 4, 1931, prepared by Revenue Agent Rush F. Vass and transmitted to you under date of November 20, 1931.

Careful consideration has been accorded your protest dated November 27, 1931, in connection with the findings of the examining officer and the information submitted at a conference held in the office of the internal revenue agent in charge.

Your claim for refund of $6,253.03 has been considered in the adjustment of your return and will be rejected on a schedule to be approved by the Commissioner.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1929, the Income Tax Unit will be unable to afford you an opportunity to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

You are advised that the power of attorney on file in this
9 office does not specifically authorize Mr. Johnson to execute a consent or waiver under the provisions of section 276(b) of the Revenue Act of 1928 extending the period within which a final notice of deficiency may be issued. In the absence of such authority this office is unable to accept the consent filed in your behalf.

Before United States Board of Tax Appeals

Answer

Filed July 10, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(a) Admits the allegations contained in paragraph (a) of the petition.

(b) Denies that the Commissioner of Internal Revenue erred in manner and form as alleged in paragraph (b), subparagraphs 1, 2, and 3, of the petition.

(c) Denies the allegations contained in paragraph (c), subparagraphs 1 to 5, inclusive, of the petition.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's petition be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
PREW SAVOY,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Stipulation as to facts

Filed October 31, 1933

It is stipulated and agreed by and between the parties hereto that the following facts may be considered upon the hearing of the above entitled cause without further proof of the same:

10 Frances G. Lee, the petitioner in the above-entitled cause, is a widow, with no dependents. Her residence is at Littleton, New Hampshire, and her business address is in care of R. M. Johnson, 606 South Michigan Avenue, Chicago, Illinois.

On September 4, 1926, George B. Glessner, a resident of Littleton, New Hampshire, died, leaving a last will and testament and codicil thereto, which were duly admitted to probate, and the following is a true and correct copy of said last will and testament and codicil thereto of George B. Glessner:

"I, George B. Glessner, a citizen of the State of New Hampshire, residing in the town of Bethlehem in Grafton County, in said State, do hereby make and publish the following as my last will and testament:

"ITEM 1. I give and bequeath to the Springfield Cemetery of Springfield, Ohio, the sum of one thousand dollars, the same to be held and controlled by the said cemetery, together with other funds held by it for the purpose of its upkeep, and the income derived from the same shall be expended in keeping my lot in said cemetery in good order, any excess not needed for that purpose to be expended in the general upkeep of the said cemetery. No separate investment or accounting for said fund shall be required of said cemetery.

"ITEM 2. I do hereby give and bequeath the sum of twenty-five thousand dollars to the Clark Memorial Home for Aged Women in the city of Springfield, Ohio; the said sum to be held, controlled, and invested by the board of trustees of the said Clark Memorial Home in such securities as are permitted by the law of Ohio to be invested in by trustees. The principal of said fund shall at all times be kept intact and be known as the 'George B. Glessner Fund', the income derived therefrom to be used towards the general support of the said home, in the discretion of the board of trustees.

"ITEM 3. I give and bequeath to Mrs. Jennie Russi, of Zanesville, Ohio, the sum of one thousand dollars in recognition

11 of her faithful care of my mother and father during their last years. In case she does not survive me, then I give the said sum to her deceased sister's son, Fred, whom she has reared, in case he survives me.

"ITEM 4. I give and bequeath to my niece, Mamie Reeder, now in Florence, Italy, and to my niece Nellie R. Blandy, wife of J. Ernest

Blandy, of Funchal, Madeira, each the sum of ten thousand dollars; and should either of said nieces die before me, leaving lawful issue then surviving, the sum so given to her shall be taken by her issue; but in case of the death of either or both of them before me, without issue surviving me, the sum so given to the one so dying shall become part of my residuary estate. Either or both of the legacies given in this item may be paid in cash or in bonds of a State or National Government or subdivision thereof, at the appraised value thereof, and acceptable to the legatee.

"ITEM 5. I give and bequeath unto Martha W. Glessner, the widow of my brother, W. L. Glessner, in case she survives me, the sum of sixty thousand dollars, and I give and bequeath unto his daughter Mary G. Paull the sum of one hundred thousand dollars; and in case said Mary G. Paull should die before me, leaving lawful issue then surviving, the said legacy given to her shall be taken by her issue per stirpe. Either of the legacies in this item may be paid in cash or in assets, preferably stocks or bonds of Wheeling, West Virginia, corporations, at the appraised value thereof, and acceptable to the legatee.

"ITEM 6. I give and bequeath to my nephew, J. G. M. Glessner, and to each of my two nieces of my own blood, namely: Frances G. Lee and Mary G. Paull, the sum of twenty-five thousand dollars. In the event of the death of such nephew or of either of said nieces before me, leaving issue surviving him or her, then the said legacy bequeathed to such nephew or niece so dying shall be taken by his or her surviving lawful issue to be distributed among such issue share and share alike per stirpe and not per capita.

12 "Any of the legacies mentioned in this item may be paid in cash or in stocks or securities at the appraised value thereof acceptable to the legatee.

"ITEM 7. I give and bequeath to my sister, Jessie G. Chandler, of Zanesville, Ohio, should she survive me, the sum of twenty-five thousand dollars to be paid in same manner as provided in item 6 preceding.

"ITEM 8. I give and bequeath unto my brother, John G. Glessner, the sum of four hundred thousand dollars in cash or the same to be accepted by him on the following conditions, namely: That he shall pay to my sister, Jessie G. Chandler, of Zanesville, Ohio, the sum of ten thousand dollars per annum during her natural life, payable at least as often as in semiannual installments. The period to be covered by said payments to begin at the time of my decease, and the payment for the last year of the life of said Jessie G. Chandler to be proportioned; and the said bequest to my said brother, John J. Glessner, is upon this further condition, that at the death of said Jessie G. Chandler he pay over one-half of the principal of said fund to his then living children in equal shares, the issue then living of a deceased child of his to take the parent's share.

"ITEM 9. I give, devise, and bequeath all the rest, residue, and remainder of my estate wherever situated, whether now owned or

hereafter acquired, including all property the subject of prior disposition herein which for any reason shall fail, be defeated, or prove ineffectual, to the children of my brother, John J. Glessner, share and share alike, the issue of any deceased child of his to take the parents share per stirpe.

"I hereby direct that all of my debts, funeral expenses, and costs of administration be paid out of the said residue, and that there also be paid out of the same any State or national inheritance taxes of the United States that may be required to be paid upon any of the legacies hereinbefore given, so as to protect the legatee in each instance against the payment of such legacy or inheritance taxes.

13 "ITEM 10. I hereby nominate and appoint my brother, John J. Glessner, and my nephew, J. G. M. Glessner, or the survivor of them, the executors or executor of this my will, and direct that no bond be required of either of them as such executor.

"I do hereby give to my said executors or to the survivor of them, full authority to settle, adjust, and compromise any matters or claims arising in connection with the settlement of my estate, and full power to sell at public or private sale upon such terms as they think proper, any of the assets of my estate in order promptly to settle the same satisfactorily to the parties interested therein.

"Hereby revoking all former wills made by me, I have in witness of the foregoing hereunto subscribed my name at Springfield, Ohio, this 19th day of June, 1917.

"G. B. GLESSNER.

"Signed and acknowledged as his last will and testament by the said George B. Glessner in our presence, and by us signed as witnesses thereto in his presence and at his request and in the presence of each other, this June 19th, 1917.

"J. E. BOWMAN.
"E. O. BOWMAN.

"Codicil to my last will and testament

"ITEM 1. I give and bequeath to my two good friends, Mrs. H. H. Bean and Chase Stewart, each the sum of ten thousand dollars, should either of them survive me; but in case of the death of either, or both, of them, before me, the sum so given to the one so dying shall become part of my residuary estate, and I desire these amounts to be paid in full free of any State and national inheritance taxes that may be required to be paid upon legacies same as provided in second paragraph of item 9, of my original will.

"Witness my signature this 5th day of June, 1919.

"G. B. GLESSNER.

14 "Witnesses:
"GEO. W. WINGER,
"HARLEM C. WEST."

Said Frances G. Lee is a child of John J. Glessner, a brother of said George B. Glessner, and was one of the beneficiaries named in item 9 of the will of said decedent.

That as a portion of the residue of the estate of said George B. Glessner passing under the provisions of item 9 of the will of said decedent, there was distributed to said Frances G. Lee 1,550 shares of the stock of International Harvester Company, of the par value of $100 per share, and 300 shares of stock of the Commonwealth Edison Company owned by said decedent at the time of his death. That the final account of the executor of the estate of said George B. Glessner, in which the distribution of said stock of International Harvester Company and Commonwealth Edison Company to said Frances G. Lee was shown, was filed and approved in the probate court of the county of Grafton and State of New Hampshire, on October 3, 1927, and said stock of the International Harvester Company and Commonwealth Edison Company was delivered to said Frances G. Lee by said executor on October 6, 1927; that on October 6, 1927, the date of the distribution of said stock of International Harvester Company and Commonwealth Edison Company to said Frances G. Lee, said common stock of International Harvester Company had a value of $228.5625 per share, and the total of 1,550 shares of common stock of International Harvester Company received by her had a value on that date of $354,271.88, and said stock of Commonwealth Edison Company had a market value of $163 a share, and said 300 shares of stock of Commonwealth Edison Company received by her had a total value on that date of $48,900.

That in 1928 said Frances G. Lee exchanged said 1,550 shares of common stock of International Harvester Company having a par value of $100.00 per share, solely for 6,200 shares of common stock of said company having no par value; that thereafter in 1928 said Frances G. Lee received 248 shares of the common stock of International Harvester Company having no par value as a stock dividend upon said 6,200 shares of common stock of said company.

That said Frances G. Lee said 6,448 shares of common stock of said International Harvester Company of no par value on the dates and for the amounts hereinafter set forth:

January 4, 1929, 948 shares	$90,787.38
January 25, 1929, 2,500 shares	248,985.00
March 5, 1929, 1,000 shares	110,710.00
September 3, 1929, 2,000 shares	273,195.00
Total net sale price, 6,448 shares	725,677.38

That on September 30, 1929, said Frances G. Lee, as the owner of said 300 shares of stock of Commonwealth Edison Company received by her under the provisions of the will of George B. Glessner, received rights to subscribe to additional stock of said company, which were sold by her forthwith for the sum of $9,402.18; that the

proper allocation of value of said rights issued on September 30, 1929, is 8.060453 percent of the value of said stock.

That the net income of said Frances G. Lee for the year 1929 from all sources, including capital net gain, was $655,570.70; that the capital net gain of said Frances G. Lee for the year 1929 included in the above total of $655,570.70 which the Commissioner concedes should be considered as capital net gain, is $222,828.68.

That the gain arising from the sale of said common stock of International Harvester Company referred to above was $372,405.50; that the gain from the sale of the rights of Commonwealth Edison Company referred to above was $5,460.62.

HUGH W. MCCULLOCH,
Counsel for Petitioner Frances G. Lee.
E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

16 Before United States Board of Tax Appeals

Docket No. 65705

FRANCES G. LEE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Hugh W. McCulloch, Esq., for the petitioner; Harold Allen, Esq., for the respondent.

Memorandum opinion

Entered February 20, 1934

SMITH: This is a proceeding for the redetermination of a deficiency in income tax for 1929 of $34,523.85. The only question in issue in this proceeding is whether the gain derived by the petitioner upon the sale of certain securities distributed to her from the residue of her deceased uncle's estate is taxable as capital net gain under the provisions of section 101 of the Revenue Act of 1928, the securities in question having been sold by the petitioner within a period of less than two years from the date of their distribution to her but after more than two years from the date of the decedent's death. There is no dispute as to the proper basis for computing the profits on the sale of the securities, or the amount of such profits.

The parties have filed a written stipulation of facts from which it appears that the petitioner was made one of the residuary legatees of the estate of her deceased uncle, who died on September 4, 1926. On October 6, 1927, the executor of the decedent's estate distributed to the petitioner, out of the residue of the estate, 1,550 shares of International Harvester Company and 300 shares of the Commonwealth Edison Company. Such distribution was approved

by the probate court of the county of Grafton, New Hampshire, on October 3, 1927. At the date of distribution the International Harvester Company stock had a value of $228.5625 per share, or a total value of $354,271.88 for the 1,550 shares, and the Commonwealth Edison Company stock had a value of $163 per share or a total value of $48,900 for the 300 shares.

17 In 1928 the petitioner exchanged the 1,550 shares of International Harvester Company stock, having a par value of $100 per share, for 6,200 shares of the company's common stock of no par value. Thereafter, in 1928, she received 248 shares of the no par value common stock as a stock dividend upon the 6,200 shares held by her. Thereafter, and during 1929, the petitioner sold all of her shares of the International Harvester Company no par value stock as follows:

January 4, 1929, 948 shares	$303,787.38
January 25, 1929, 2,500 shares	248,985.00
March 5, 1929, 1,000 shares	110,710.00
September 3, 1929, 2,000 shares	273,195.00
Total net sale price, 6,448 shares	726,677.38

On September 30, 1929, the petitioner, as owner of 300 shares of the stock of the Commonwealth Edison Company, received the rights to subscribe for additional shares of stock, which subscription rights were immediately sold by her for the amount of $9,402.18. The proper allocation of value of the subscription rights is 8.060453 percent of the value of the stock.

The petitioner's net income from all sources for the taxable year 1929, including capital net gain of $222,828.68, was $655,570.70.

The petitioner's gain from the sale of the International Harvester Company common stock referred to above was $372,405.50. The petitioner's gain from the sale of the stock subscription rights of Commonwealth Edison Company referred to above was $5,460.62.

The question here presented for our determination is controlled by the Board's decisions in Nancy K. McFeely, 29 B. T. A. —, promulgated February 2, 1934, and Isabel K. Dibblee, 29 B. T. A. —, promulgated February 13, 1934. We held in those cases that the date of distribution of securities to the legatee or devisee determines the beginning of the period for which they shall be deemed to have

18 been held by such distributee for the purpose of determining the applicability of section 101 of the Revenue Act of 1928. Upon authority of those cases we hold that the securities in question were not held by the petitioner for more than two years within the meaning of section 101 (c) (8) and that the petitioner is not entitled to report the profits from the sale of the securities in question as capital net gain.

Judgment will be entered under rule 50.

Before the United States Board of Tax Appeals

Decision

Entered March 29, 1934

Pursuant to memorandum opinion of the Board entered on February 20, 1934, the respondent herein having on March 14, 1934, filed a notice of settlement and proposed recomputation and the petitioner having on March 22, 1934, filed an acquiescence in the computation as made by the respondent, now therefore, it is

Ordered and decided: That there is a deficiency in income tax for the year 1929 in the amount of $34,523.85.

CHARLES P. SMITH, *Member.*

In United States Circuit Court of Appeals

Petition for review of decision of the United States Board of Tax Appeals

Filed June 6, 1934

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Your petitioner, Frances G. Lee, respectfully petitions for a review by the United States Circuit Court of Appeals for the First Circuit of the decision of the United States Board of Tax Appeals, rendered on the 29th day of March 1934 pursuant to findings of fact in the opinion promulgated on February 20, 1934, in the case of Frances G. Lee, petitioner, v. Commissioner of Internal Revenue, respondent, Board of Tax Appeals Docket No. 65705, wherein the Board affirmed the determination of the Commissioner of Internal Revenue
19 of a deficiency in income tax against the petitioner for the year 1929 in the sum of $34,523.85, and in support of this petition, the petitioner shows this honorable court as follows:

I. STATEMENT OF THE NATURE OF THE CONTROVERSY

The issue raised in this proceeding is whether the gains received by the petitioner in the year 1929 upon the sale of stock of the International Harvester Company in the sum of $372,405.50 and upon the sale of stock subscription rights of Commonwealth Edison Company in the sum of $5,460.62 should be considered, as contended by the petitioner, "capital net gain" as defined in section 101 of the Revenue Act of 1928.

On September 4, 1926, George B. Glessner, a resident of Littleton, New Hampshire, died, leaving a last will and testament which was duly admitted to probate. Under the provisions of the will of said decedent the residue of his estate was given to the petitioner,

Frances G. Lee, and others, and as a portion of the residue of the estate of said George B. Glessner, said Frances G. Lee became the owner of 1,550 shares of stock of the International Harvester Company of the par value of $100 per share and 300 shares of stock of the Commonwealth Edison Company.

On October 6, 1927, the executor of the estate of George B. Glessner distributed to said Frances G. Lee said 1,550 shares of stock of the International Harvester Company of the par value of $100 per share, and said 300 shares of stock of the Commonwealth Edison Company, such distribution being approved by the probate court of the county of Grafton, New Hampshire, on October 3, 1927. At the date of distribution said stock of International Harvester Company had a value of $228.5625 per share and a total value of $354,271.88, and said stock of the Commonwealth Edison Company had a value of $163 per share and a total value of $48,900.

In the year 1928, by reason of the payment of stock dividends and the exchange of said stock of the International Harvester Company of $100 par value for stock of said company having no par value, said Frances G. Lee, as the owner of said 1,550 shares of stock of International Harvester Company of the par value of $100 per share, received 6,448 shares of the common stock of International Harvester Company having no par value.

Frances G. Lee sold said 6,448 shares of said common stock of said International Harvester Company of no par value during the year 1929 for the sum of $726,677.38 and the gain arising from the sale of said stock was in the sum of $372,405.50.

Frances G. Lee, as the owner of said 300 shares of stock of Commonwealth Edison Company, on September 30, 1929, received the right to subscribe for additional shares of stock, which subscription rights were immediately sold by her for the sum of $9,402.18. The proper allocation of value of said rights is 8.060453 percent of the value of said stock and the gain arising from the sale of said rights is in the sum of $5,460.62.

The total net income of the petitioner for the year 1929 from all sources, including capital net gain, was		$855,570.70
The capital net gain of the petitioner for the year 1929 included above, which the Commissioner concedes should be considered as capital net gain, was	$222,828.68	
The net gain of the petitioner for the year 1929 included above in the total of the net income from all sources, arising from the sale of the stock of International Harvester Company referred to above was	372,405.50	
And from the sale of rights of Commonwealth Edison Company referred to above was	5,460.62	
The total capital net gain of the petitioner in 1929, if the net gain from the sale of said stock in International Harvester Company and Commonwealth Edison Company should be included therein, was		600,694.80

The total net income of the petitioner in 1929 subject to surtax, if the net gain from the sale of said stock of International Harvester Company and Commonwealth Edison Company is excluded therefrom was		$54,875.90
The total amount of dividends received by the petitioner in 1929 was	$88,566.02	
The personal exemption was	1,500.00	
		90,066.02
The balance of income subject to normal tax was		0
Surtax on $54,875.90 was	3,642.63	
Tax at 12½ percent on capital net gain of $600,694.80 was	75,086.85	
Total tax should be		78,729.48
Less: Credit for earned income	4.38	78.18
Income tax paid at source	73.80	78.18
Total tax assessable, as contended by the petitioner		78,651.30
Your petitioner has paid, on account of income tax for the year 1929 believed to be due, the sum of		84,947.00
The total tax assessable as shown above is		78,651.30
Total amount of refund now due to the petitioner is therefore		6,295.70

Said Frances G. Lee filed her income-tax return for the year 1929 and included therein the items of income as set forth above and paid tax thereon as set forth above. The Commissioner of
22 Internal Revenue reviewed said return and excluded from the amount of "capital net gain" of the petitioner subject to tax in the year 1929 the gain received upon the sale of said stock of International Harvester Company and upon the sale of the rights of the Commonwealth Edison Company the total sum of $377,866.12.

The petitioner appealed from the determination of the Commissioner of Internal Revenue in proceedings before the Board of Tax Appeals, Docket No. 65705.

After the hearing upon said petition, the Board promulgated its decision in said cause on February 20, 1934, wherein it sustained the contentions of the Commissioner and held that said stock of International Harvester Company and Commonwealth Edison Company sold by the petitioner in 1929 was not held by the petitioner for more than two years prior to the date of the sale, within the meaning of section 101 of the Revenue Act of 1928, and further held that the petitioner was not entitled to report the profits from the sale of said securities as capital net gain. Thereafter, on March 29, 1934, the Board entered a final order of redetermination, finding a deficiency in income tax of $34,523.85 for the year 1929.

II. Designation of Court of Review

The petitioner resides at Littleton, New Hampshire, and her income-tax return for the year 1929 was filed in the office of the collector of internal revenue at Portsmouth, New Hampshire. The petitioner, being aggrieved by said findings of fact, opinion, decision,

and order, desires a review thereof in accordance with the provisions of the Revenue Act of 1928 by the United States Circuit Court of Appeals for the First Circuit.

III. Assignments of Error

The petitioner, as a basis for review, makes the following assignments of error:

1. The United States Board of Tax Appeals erred in determining that the date of distribution of securities to the legatee
23 or devisee determines the beginning of the period for which they shall be deemed to have been held by such distributee for the purpose of determining the applicability of section 101 of the Revenue Act of 1928.

2. The United States Board of Tax Appeals erred in determining that the petitioner did not hold said stock of International Harvester Company sold by her in 1929 from September 4, 1926, the date of the death of said George B. Glessner.

3. The United States Board of Tax Appeals erred in determining that the petitioner did not hold said stock of Commonwealth Edison Company sold by her in 1929 from September 4, 1926, the date of the death of said George B. Glessner.

4. The United States Board of Tax Appeals erred in approving the determination of the Commissioner of the deficiency in income tax for the year 1929 in the sum of $34,523.85.

5. The United States Board of Tax Appeals erred in not sustaining the contentions of the petitioner and in not finding that the petitioner was entitled to a refund of $6,295.70 and interest thereon, the amount of overpayment of tax made by the petitioner upon the filing of said return.

Wherefore, your petitioner prays that this honorable court may review said findings, decision, opinion, and order, and reverse and set aside the same, and for such other and further relief as the court may deem proper in the premises.

Frances G. Lee.

Hugh W. McCulloch,
Frank H. McCulloch,
Attorneys for Petitioner.

[*Duly sworn to by Frances G. Lee, jurat omitted in printing.*]

24 Before United States Board of Tax Appeals

Praecipe for record

Filed June 6, 1934

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, certify, and transmit to the clerk of the United States Circuit Court of Appeals for the First Circuit, with

reference to the petition for review of the final order and decision of the Board in the proceedings before said Board, No. 65705, heretofore filed by the petitioner in the above-entitled cause, a transcript and record in the above cause prepared and transmitted as required by law and the rules of said court, and include in said transcript of record the following documents or certified copies thereof:

(1) The docket entries of all proceedings before the Board of Tax Appeals;

(2) Pleadings before the Board of Tax Appeals as follows:

(a) Petition for redetermination;

(b) Answer of the respondent;

(3) Memorandum opinion of the Board of Tax Appeals;

(4) The decision of the Board of Tax Appeals;

(5) The petition for review filed by the petitioner in the above cause; and

(6) Praecipe for record.

HUGH W. McCULLOCH,
FRANK H. McCULLOCH,
Attorneys for Frances G. Lee, Petitioner.

Before United States Board of Tax Appeals

Supplemental praecipe for record

Filed July 26, 1934

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, certify and transmit to the clerk of
25 the United States Circuit Court of Appeals for the First Circuit, with reference to the petition for review of the final order and decision of the Board in the proceedings before said Board, No. 65705, heretofore filed by the petitioner in the above-entitled cause, a transcript and record in the above cause prepared and transmitted as required by law and the rules of said court, and include in said transcript of record, in addition to the documents enumerated in the praecipe for record heretofore filed in the above-entitled cause, the following:

(1) Stipulated facts; and

(2) Supplemental praecipe for record.

HUGH W. McCULLOCH,
FRANK H. McCULLOCH,
Attorneys for Frances G. Lee, Petitioner.

[Clerk's certificate to foregoing transcript omitted in printing.]

[Memorandum: An order of enlargement of time for docketing case to, and including, September 15, 1934, is here omitted. A. I. Charron, Clerk.]

26 [Minute entry of hearing, Jan. 8, 1935, omitted in printing.]

27 In United States Circuit Court of Appeals for the First Circuit

October term, 1934

No. 2956

FRANCES G. LEE, PETITIONER FOR REVIEW

v.

COMMISSIONER OF INTERNAL REVENUE

Appeal from Board of Tax Appeals

Before BINGHAM, WILSON, AND MORTON, JJ.

Opinion of the court

March 9, 1935

WILSON, *J.:* This is a petition for review of a decision of the Board of Tax Appeals. The main issue is the same as that involved in the case of First National Bank of Boston et al. v. United States, decided by this court on March 9, 1935. There was a sale of securities by a residuary legatee in 1929, more than two years after the death of the testator, but less than two years from the date of distribution. The Commissioner assessed the gain in accordance with sec. 113 (a) (5) of the Revenue Act of 1928, but held it was not a capital gain, which was affirmed by the Board of Tax Appeals. Since the acquisition of the securities sold dates back to the death of the testator, Brewster v. Gage, 280 U. S. 327; Chandler v. Field, 63 Fed. (2d) 13, 15; certiorari denied, 289 U. S. 758; Walker v. Hill, 73 N. H. 254; Sanborn v. Clough, 64 N. H. 315, they were held more than two years and should be treated in assessing the tax as a capital gain, although the amount of the gain was properly determined under sec. 113 (a) (5). See First National Bank of Boston, et al. v. United States, supra.

28 As to the sale of the rights in the Commonwealth Edison Company, their acquisition also dates back to the death of the testator, who was the original owner of the stock, out of which the rights arose. It is stipulated that the gain from the sale of the rights was the sum of $5,460.62, based on the value of the stock of the Commonwealth Edison Company on October 6, 1927; but since the date of acquisition of the rights to subscribe to stock dates back to the date of acquisition of the stock, this gain must also be treated as capital gain.

It appears from the petitioner's petition for review that if the above items are capital gain, not only was the deficiency tax assessed by the Commissioner improperly assessed, but that the petitioner was entitled to a refund.

The decision of the Board of Tax Appeals is reversed and the case remanded for further proceedings not inconsistent with this opinion.

In United States Circuit Court of Appeals

Final decree

March 9, 1935

This cause came on to be heard January 8, 1935, upon the record on petition for review of the United States Board of Tax Appeals, and was argued by counsel:

Upon consideration whereof, it is now, to wit, March 9, 1935, here ordered adjudged and decreed as follows: The decision of the Board of Tax Appeals is reversed and the case is remanded for further proceedings not inconsistent with the opinion passed down this day.

By the court,

ARTHUR I. CHAKRON, *Clerk.*

Recital as to issuance of mandate

Thereafter, to wit, on April 9, 1935, mandate issued.

29 [Clerk's certificate to foregoing transcript omitted in printing.]

30 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted and the case is assigned for argument immediately following No. 110.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 39665. U. S. Circuit Court of Appeals, First Circuit. Term No. 111. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Frances G. Lee. Petition for a writ of certiorari and exhibit thereto. Filed June 7, 1935. Term No. 111, O. T., 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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139747—35

In the Supreme Court of the United States.

OCTOBER TERM, 1935

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FRANCES G. LEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled cause on March 9, 1935, reversing the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16–18) is not reported. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 203.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered March 9, 1935. (R. 27.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether personal property of a decedent, passing to the taxpayer otherwise than by specific bequest, may be considered to have been held by the taxpayer, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, during any period prior to actual distribution to the taxpayer.

STATEMENT

This case involves Federal income taxes for the year 1929 in the sum of $34,523.85. (R. 8.) The facts were stipulated (R. 9–15), and as found by the Board of Tax Appeals (R. 16–17) may be summarized as follows:

The taxpayer is a resident of Littleton, New Hampshire. Under the will of her deceased uncle, George B. Glessner, who died on September 4, 1926 (R. 10), the taxpayer was made one of his residuary legatees (R. 12, Item 9; R. 14). On October 6, 1927, the executor of the decedent's estate distributed to the taxpayer, out of the residue of the estate, 1,550 shares of International Harvester

Company and 300 shares of the Commonwealth Edison Company. (R. 14.)

In 1928, the taxpayer exchanged the 1,550 shares of International Harvester Company, which had a par value of $100 per share, for 6,200 shares of that company having no par value, and, later, during that year, received 248 shares of the stock of the same company having no par value as a stock dividend upon the 6,200 shares then held by her. (R. 14–15.)

The taxpayer sold in 1929 the said 6,448 shares of International Harvester Company on dates as follows (R. 15):

January 4, 1929, 948 shares.
January 25, 1929, 2,500 shares.
March 5, 1929, 1,000 shares.
September 3, 1929, 2,000 shares.

On September 30, 1929, the taxpayer, as owner of the 300 shares of stock of Commonwealth Edison Company aforementioned, received rights to subscribe to additional stock of said company, which she sold forthwith for $9,402.18. The proper allocation of value of said rights is 8.060453 percent of the value of said stock. (R. 15.)

The gain arising from the sale of the stock of International Harvester Company referred to above was $372,405.50. The gain from the sale of the rights of Commonwealth Edison Company referred to above was $5,460.62. (R. 15.) The amount of such gain was not disputed. (R. 16.)

The taxpayer included the gain realized from the sale of the stock and rights above mentioned in her income-tax return for the year 1929 as capital net gain, and computed the tax thereon at 12½% of said gain. (R. 5, 6.)

The respondent, in his letter of final determination of deficiency for the year 1929, treated the gain as ordinary income and asserted a deficiency in income tax for that year in the sum of $34,523.85. (R. 7–9.)

The Board of Tax Appeals found that the securities hereinabove mentioned had not been held by the taxpayer for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and determined that there was a deficiency in income tax for the year 1929 in the amount of $34,523.85. (R. 18.) The Circuit Court of Appeals for the First Circuit reversed the Board of Tax Appeals on the authority of its decision in *First Nat. Bank of Boston* v. *United States*, 76 F. (2d) 200.

SPECIFICATION OF ERRORS TO BE URGED

The Commissioner urges that the Circuit Court of Appeals erred:

1. In holding that the taxpayer, as a residuary legatee receiving personal property upon distribution of the decedent's estate, was to be deemed to have held such property from the date of the decedent's death for the purpose of determining the

holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928.

2. In failing and refusing to hold that for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, the taxpayer, as a residuary legatee, should be deemed to have held personal property received from distribution of the decedent's estate only from the date of actual distribution to the taxpayer.

3. In reversing the decision of the Board of Tax Appeals and remanding the case.

REASONS FOR GRANTING THE WRIT

The question here presented is identical with that presented in *United States of America* v. *First National Bank of Boston et al.*, No. ———, October term, 1935, petition for a writ of certiorari in which case is being filed simultaneously herewith.

For the reasons set forth in the Government's petition in the case of *United States of America* v. *First National Bank of Boston et al.*, it is respectfully submitted that the petition here should be granted.

STANLEY REED,
Solicitor General.

JUNE 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 111

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FRANCES G. LEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 11–12) is not reported. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 203 (R. 18).

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered March 9, 1935 (R. 19). Petition for writ of certiorari was filed June 7, 1935, and

was granted October 14, 1935. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1919 the respondent, a residuary legatee, sold securities more than two years after the death of her testator but less than two years from the date of distribution to her. Were the securities "held" by the respondent for more than two years so that the gain on the sale thereof is taxable as a "capital net gain" within the meaning of Section 101 of the Revenue Act of 1928?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*, pp. 7–13.

STATEMENT

This case involves Federal income taxes for the year 1929 in the sum of $34,523.85 (R. 13). The facts were stipulated (R. 7–11), and as found by the Board of Tax Appeals (R. 11–12) may be summarized as follows:

The respondent is a resident of Littleton, New Hampshire. Under the will of her deceased uncle, George B. Glessner, who died on September 4, 1926 (R. 7), the respondent was made one of his residuary legatees (R. 8–10). On October 6, 1927, the executor of the decedent's estate distributed to the respondent, out of the residue of the estate, 1,550

shares of International Harvester Company and 300 shares of the Commonwealth Edison Company (R. 10).

In 1928 the respondent exchanged the 1,550 shares of International Harvester Company, which had a par value of $100 per share, for 6,200 shares of that company having no par value, and, later, during that year, received 248 shares of the stock of the same company having no par value as a stock dividend upon the 6,200 shares then held by her (R. 10).

The respondent sold in 1929 the said 6,448 shares of International Harvester Company on dates as follows (R. 10):

January 4, 1929, 948 shares.
January 25, 1929, 2,500 shares.
March 5, 1929, 1,000 shares.
September 3, 1929, 2,000 shares.

On September 30, 1929, the respondent, as owner of the 300 shares of stock of Commonwealth Edison Company aforementioned, received rights to subscribe to additional stock of said company, which she sold forthwith for $9,402.18 (R. 10).

The gain arising from the sale of the stock of International Harvester Company referred to above was $372,405.50. The gain from the sale of the rights of Commonwealth Edison Company referred to above was $5,460.62 (R. 11). The amount of such gain was not disputed (R. 11).

The respondent included the gain realized from the sale of the stock and rights above mentioned in her income-tax return for the year 1929 as capital net gain, and computed the tax thereon at 12½ percent of said gain (R. 11).

The petitioner, in his letter of final determination of deficiency for the year 1929, treated the gain as ordinary income and asserted a deficiency in income tax for that year in the sum of $34,523.85 (R. 5).

The Board of Tax Appeals found that the securities hereinabove mentioned had not been held by the respondent for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and determined that there was a deficiency in income tax for the year 1929 in the amount of $34,523.85 (R. 12–13). The Circuit Court of Appeals for the First Circuit reversed the Board of Tax Appeals on the authority of its decision in *First Nat. Bank of Boston* v. *United States*, 76 F. (2d) 200.

SPECIFICATION OF ERRORS TO BE URGED

The petitioner urges that the Circuit Court of Appeals erred:

1. In holding that the respondent, as a residuary legatee receiving personal property upon distribution of the decedent's estate, was to be deemed to have held such property from the date of the decedent's death for the purpose of determining the

holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928.

2. In failing and refusing to hold that for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, the respondent, as a residuary legatee, should be deemed to have held personal property received from distribution of the decedent's estate only from the date of actual distribution to the respondent.

3. In reversing the decision of the Board of Tax Appeals and remanding the case.

ARGUMENT

The question here presented is identical with that presented in *United States* v. *The First National Bank of Boston,* No. 110, October Term, 1935, pending before this Court, and is essentially the same question presented in *Dibblee* v. *Helvering,* No. 494, October Term, 1935; *Rand* v. *Helvering,* No. 439, October Term, 1935; *Ogle* v. *Helvering,* No. 137, October Term, 1935; and *McFeely* v. *Helvering,* No. 24, October Term, 1935, now pending before this Court. In the interest of brevity and to avoid needless repetition, the petitioner adopts and incorporates herein, by reference, the argument presented in the brief filed on behalf of the respondent in the case of *McFeely* v. *Helverig,* No. 24, October Term, 1935, pending before this Court.

CONCLUSION

We respectfully submit that the decision of the Court below was erroneous and should be reversed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
JOHN MACC. HUDSON,
BERRYMAN GREEN,
Special Assistant to the Attorney General.

OCTOBER 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 815, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business); but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113 the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property, however acquired, there shall be included the period for which such property was held by any other person, if under the provisions of section

113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property;

* * * * *

(2) *Gift after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or

the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) *Transfer in Trust after December 31, 1920.*—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall

be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *.

Treasury Regulations 74:

ART. 596. *Property transmitted at death.*— In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the

basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

S. Rep. 960, 70th Cong., 1st Sess. (p. 26):

Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general

or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

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No. 111

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

vs.

FRANCES G. LEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 111

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

vs.

FRANCES G. LEE,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

Introduction.

On October 14, 1935, the petition for a writ of certiorari in the above entitled cause was granted and the case was assigned for argument on October 22, 1935. The brief of the petitioner has not yet been received by counsel for the respondent, but counsel has been advised by the Attorney General that the brief to be filed on behalf of the Commis-

sioner in this case will adopt the argument contained in the Commissioner's brief in the case of *Nancy K. McFeely* v. *Guy T. Helvering, Commissioner of Internal Revenue*, now pending in this Court as No. 24. Reference will therefore be made in this brief to the "Statement" and the "Specification of Errors to be Urged" set forth in the petition for a writ of certiorari filed in this case. Reference will also be made in the Argument to the Brief for the Respondent in said case of *Nancy K. McFeely* v. *Guy T. Helvering, Commissioner of Internal Revenue.*

Opinions Below.

The opinion of the Board of Tax Appeals (R., 16-18) is not reported. The opinion of the Circuit Court of Appeals for the First Circuit is reported in 76 F. (2d) 203.

Jurisdiction.

The judgment of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered March 9, 1935. (R., 27.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

The question presented in this case is whether stocks received by the taxpayer on October 6, 1927, as a portion of the residue of the estate of George B. Glessner, who died on September 4, 1926, a resident of the State of New Hampshire, which were thereafter sold by the taxpayer during the year 1929 were "Capital Assets," as defined in Section 101 of the Revenue Act of 1928.

Statement.

The statement of the case appearing at pages 2, 3 and 4 of the petition for a writ of certiorari correctly sets forth the facts involved in this case.

Summary of Argument.

The Circuit Court of Appeals for the First Circuit correctly determined that the stock of International Harvester Company and Commonwealth Edison Company received by the taxpayer under the provisions of the Will of George B. Glessner, who died on September 4, 1926, which were sold by her in 1929 were "Capital Assets" and correctly determined that the gain from the sale of said stocks was a "Capital Gain," all as defined in Section 101 of the Revenue Act of 1928.

I.

The taxpayer acquired the stocks here in question upon the death of Mr. Glessner in 1926 and held these stocks from that date until the date of their sale in 1929.

A. The date upon which the taxpayer acquired and became vested with the ownership of the stocks here in question is to be determined by the laws of New Hampshire.

Poe v. *Seaborn*, 282 U. S. 101, 110.
De Vaughn v. *Hutchinson*, 165 U. S. 566, 570.

B. The taxpayer here contends, as she contended in the proceedings before the Circuit Court of Appeals, that under the laws of New Hampshire, the title to the residue of the estate of Mr. Glessner vested immediately upon his death in the residuary legatees named in his will and as one of those legatees, her title and interest in the stocks here in question became vested at that time.

Walker v. *Hill*, 73 N. H. 254; 60 Atl. 1017, 1019.
Carter v. *Whitcomb*, 74 N. H. 482, 69 Atl. 779, 781.
Sanborn v. *Clough*, 64 N. H. 315, 10 Atl. 678.

II.

The taxpayer here contends, as she contended in the proceedings before the Circuit Court of Appeals, that the stocks here in question, were "held" by her from the date of the death of Mr. Glessner in 1926, which was more than two years prior to the date of their sale, and these stocks were, therefore, "Capital Assets," as defined in Section 101 (c)(8) of the Revenue Act of 1928.

A. The word "held" as used in Section 101 (c)(8) of the Revenue Act of 1928 means "owned" or "having title to" and property "owned" by a taxpayer is property "held" by that taxpayer.

1. It is a well settled and often reiterated rule that words used in the Revenue Act should be given their usual and ordinary meaning.

Old Colony R. R. v. *Commissioner*, 284 U. S. 552, 560.

B. The period during which property is "held" by a taxpayer commences with the date on which the ownership in the property is acquired by the taxpayer.

Dunigan v. *Burnet*, 66 F. (2d) 201, 202.

Hooper v. *Commissioner*, 26 B. T. A. 758, 760.

Shaffer v. *Commissioner*, 28 B. T. A. 1294, 1309.

Helvering v. *New York Trust Company*, 292 U. S. 455, 469.

First National Bank of Boston v. *United States*, 76 F. (2d) 200, 202.

C. In interpreting the provisions of the Revenue Acts, the Supreme Court has held that the date of the acquisition by a residuary beneficiary of her interest in the estate of a decedent is the date of the death of the decedent even in those states where contrary to the rule in New Hampshire it is held that title to the personal property vests in the executor named in the will of the decedent.

Brewster v. *Gage*, 280 U. S. 327, 333.

First National Bank of Boston v. *United States*, 76 F. (2d) 200, 202.

III.

The Commissioner erroneously contends that under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, the stocks here in question were not "held" by the taxpayer until they came into her physical possession.

A. The Commissioner has held, with reference to the similar Capital Gain Section of the Revenue Act of 1921, that the period of holding by a residuary beneficiary of personal property commences with the date of acquisition, which has been held to be the date of death.

Income Tax Ruling 1889, III-1 C. B. 70.

B. The rulings of the Commissioner interpreting the Capital Gain Section of the Revenue Act of 1921 must be deemed to have received legislative approval by the re-enactment of the provisions of the law referred to in the ruling, in the Revenue Acts of 1924, 1926 and 1928.

Brewster v. *Gage*, 280 U. S. 327, 337.

U. S. v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466.

Massachusetts Mutual Life Insurance Co., v. *U. S.*, 288 U. S. 269, 273.

Helvering v. *Bliss*, 293 U. S. 144, 151.

C. Neither physical possession nor legal title to the property in question for two years is required in order that the property may be considered as "held" under the provisions of Section 101 (c)(8) of the Revenue Act of 1928.

Income Tax Ruling 1889, III-1 C. B. 70.
Helvering v. *New York Trust Co.*, 292 U. S. 455.
Article 501, Regulations 74, Revenue Act of 1928, G. C. M. 11645, XII-1 C. B. 117.
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Income Tax Ruling 2466, VII-1 C. B. 95.
Bradbury v. *Commissioner*, 353-A-C. C. H. 10107.

IV.

The Commissioner erroneously contends that Sections 101(c)(8) and 113(a)(5) of the Revenue Act of 1928 must be read together and that it was the intention of Congress that the two-year holding period of a general or residuary legatee should begin at the date of distribution.

A. Section 101(c)(8) of the Revenue Act of 1928 does not adopt or incorporate in its provisions any part of Section 113(a)(5) of that Act. Said Section 113(a)(5) does not purport to limit, control or modify the provisions of said Section 101(c)(8).

B. In enacting Section 113(a)(5) of the Revenue Act of 1928 which effected a change in the law as to the "basis date" for determining gain or loss from the sale of property transmitted at death, Congress did not intend thereby to modify or change the interpretation of the provisions of Section

101(c)(8) which was not changed by the Revenue Act of 1928.

U. S. v. Flores, 289 U. S. 137, 149.
Gulf States Steel Co. v. *U. S.*, 287 U. S. 32, 45.
U. S. Cartridge Co. v. *U. S.*, 284 U. S. 511, 516.

1. The legislative history of Section 113(a)(5) of the Revenue Act of 1928 shows clearly that Congress did not intend by that enactment to modify or change the interpretation of the provisions of Section 101(c)(8) of that Act.

2. That Congress recognized that Section 113(a)(5) of the Revenue Act of 1928 did not modify or change the interpretation of Section 101(c)(8) of the Revenue Act of 1928 and recognized that said Section 113(a)(5) provided one date for the "basis date for valuation" and recognized that said Section 101(c)(8) provided for a different date for the commencing of the period during which personal property is "held" by a residuary legatee, is clearly evidenced by the change made in the provisions of the "Basis for Determining Gain or Loss" Section of the Revenue Act of 1934.

3. It cannot be held that Congress intended that Section 113(a)(5) of the Revenue Act of 1928 should modify or change the interpretation of Section 101(c)(8) of the Revenue Act of 1928 because in those instances where Congress desired that the "Capital Gain" Section should be modified by the "Basis for Determining Gain or Loss" Section, specific provision was made with reference thereto in the "Capital Gain" section.

First National Bank of Boston v. *United States*, 76 F. (2d) 200, 202.

V.

The Commissioner erroneously contends that, "It is not logical to presume that Congress deliberately fixed a date for determining the basis of property wholly without regard for the date when the two-year holding period should begin."

Shaffer v. *Commissioner*, 28 B. T. A. 1294.

VI.

The case of Helvering v. New York Trust Co. was erroneously relied upon by the Circuit Courts of Appeal in the cases of Rand v. Helvering and Ogle v. Helvering and is erroneously cited by the Commissioner as authority controlling the decision of this case.

Helvering v. *New York Trust Co.*, 292 U. S. 455.
Helvering v. *Bliss*, 293 U. S. 144.
First National Bank of Boston v. *United States*, 76 F. (2d) 200, 202.

VII.

The principles of law announced in Crooks v. Harrelson and in like cases should be controlling in this Lee case.

Crooks v. *Harrelson*, 282 U. S. 55.

ARGUMENT.

The Circuit Court of Appeals for the First Circuit correctly determined that the stock of International Harvester Company and Commonwealth Edison Company received by the taxpayer under the provisions of the Will of George B. Glessner, who died on September 4, 1926, which were sold by her in 1929 were "Capital Assets" and correctly determined that the gain from the sale of said stocks was a "Capital Gain," all as defined in Section 101 of the Revenue Act of 1928.

I.

The taxpayer acquired the stocks here in question upon the death of Mr. Glessner in 1926 and held these stocks from that date until the date of their sale in 1929.

A. The date upon which the taxpayer acquired and became vested with the ownership of the stocks here in question is to be determined by the laws of New Hampshire.

George B. Glessner was a resident of the State of New Hampshire at the date of his death and his will was admitted to probate in the State of New Hampshire (Trans., p. 10). The taxpayer is a resident of New Hampshire and the nature of the right, title and interest which she obtained under the will of this decedent must be determined in the absence of an express provision to the contrary in the Revenue Act in accordance with the laws of New Hampshire, as in any determination involving the vesting of titles, properties or interests therein, the Federal courts

follow and are controlled by the law of the State in which such question arises.

In the case of *Poe* v. *Seaborn*, 282 U. S. 101, the question certified to the Court for decision was whether Mr. Seaborn was required to include in his taxable income among other items the entire amount of the profits on the sale of real estate standing in the name of Mr. Seaborn alone or whether only one-half thereof was taxable to him because of the Community Property Law. Mr. and Mrs. Seaborn were residents of the State of Washington and their respective interest in this real estate was determined by the Community Property Law of Washington. The Court said at page 110:

> "The Commissioner concedes that the answer to the question involved in the cause must be found in the provisions of the law of the State, as to a wife's ownership of or interest in community property. What, then, is the law of Washington as to the ownership of community property and of community income, including the earnings of the husband's and wife's labor?
>
> The answer is found in the statutes of the State, and the decisions interpreting them."

See also:

De Vaughn v. *Hutchinson*, 165 U. S. 566, 570.

B. The taxpayer here contends, as she contended in the proceedings before the Circuit Court of Appeals, that under the laws of New Hampshire, the title to the residue of the estate of Mr. Glessner vested immediately upon his death in the residuary legatees named in his will and as one of those legatees, her title and interest in the stocks here in question became vested at that time.

This is clearly shown by the case of *Walker* v. *Hill*, (Supreme Court of New Hampshire, May 2, 1905), 73 N. H. 254; 60 Atl. 1017. This was a bill for the construction of

the will of Gustavus Walker. Under the provisions of this will, the decedent gave to his wife all of his household furniture and furnishings and one-half of the remainder of his estate, real, personal and mixed, and the income from the remaining one-half of the estate during her lifetime.

The lower court requested instructions from the Supreme Court and among these questions were (p. 1018): "(4) When did her title as legatee and devisee vest?" The Court said at page 1019:

> "* * * The title to all the real estate and that part of the personal property not needed for the payment of such charges vested in her on his death, one-half in fee and the other for life, for that is the time when his will became operative."

In the case of *Carter* v. *Whitcomb* (Supreme Court of New Hampshire, April 7, 1908), 74 N. H. 482, 69 Atl. 779, the Court said at page 781:

> "The testatrix's will became effective to pass property upon her death. The necessary delays incident to the settlement of the estate and final decree of distribution did not postpone the passing of the estate within the meaning of the statute. The legatees derived their title from the testatrix. Their rights became fixed at her death. They then became the owners of the property bequeathed to them, though the possession and actual enjoyment thereof were delayed by operation of law, * * *"

See also, *Sanborn* v. *Clough*, (Supreme Court of New Hampshire, July 15, 1887) 64 N. H. 315, 10 Atl. 678.

That the taxpayer acquired her title and interest in the stocks here in question at the date of the death of Mr. Glessner is further shown by the fact that after the death of Mr. Glessner, any increase or decrease in the value of these stocks, increased or decreased the value of the estate of the taxpayer; she had the right to transfer or assign

her interest in these stocks at any time; these stocks would have been a portion of her estate had she died; these stocks were subject to the claims of her creditors; she was entitled to the benefit of the dividends that were thereafter declared thereon; she had all the benefits of complete and absolute ownership therein from the date of the death of Mr. Glessner to the date upon which she sold said stocks; her interest in and title to these stocks did not originate in, upon or by the decree of distribution.

This contention of the taxpayer was not controverted by the Commissioner in the proceedings before the Circuit Court of Appeals and was approved by that Court. The respondent, therefore, assumes that in these proceedings the petitioner will concede that under the laws of New Hampshire, the taxpayer acquired her title and interest in the stocks here in question in 1926, upon the death of Mr. Glessner.

II.

The taxpayer here contends, as she contended in the proceedings before the Circuit Court of Appeals, that the stocks here in question, were "held" by her from the date of the death of Mr. Glessner in 1926, which was more than two years prior to the date of their sale, and these stocks were, therefore, "capital assets," as defined in Section 101 (c) (8) of the Revenue Act of 1928.

Section 101(*c*) (8) of the Revenue Act of 1928 is as follows:

> "'Capital Assets' means property held by the taxpayer for more than two years. * * *"

The meaning or definition of the word "held" should therefore determine the issues in this case.

A. The word "held" as used in Section 101(c)(8) of the Revenue Act of 1928 means "owned" or "having title to" and property "owned" by a taxpayer is property "held" by that taxpayer.

1. It is a well settled and often reiterated rule that words used in the Revenue Act should be given their usual and ordinary meaning.

In the case of *Old Colony R. R.* v. *Commissioner*, 284 U. S. 552, in considering the meaning of the phrase, "all interest paid * * * on its indebtedness," which appears in the definition of the net income of a corporation in the Revenue Act of 1921, Mr. Justice Roberts, speaking for the Court, said at p. 560:

> "Is this the reasonable construction of the language of the act,—'all interest * * * on its indebtedness'? The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' *Levy's Lessee* v. *McCartee*, 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' *Maillard* v. *Lawrence*, 16 How. 251, 261. And see *United States* v. *Buffalo Gas Co.*, 172 U. S. 399, 341; *United States* v. *First Nat. Bank*, 234 U. S. 245, 258; *Caminetti* v. *United States*, 242 U. S. 470, 485. As was said in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts: *DeGanay* v. *Lederer*, 250 U. S. 376, 381."

The usual and ordinary meaning of the word "held" is indicated in the definitions of "hold" appearing in standard dictionaries.

In New English Dictionary, Oxford Edition, "hold" is defined as "to own, have as property, to be the owner."

In Webster's New International Dictionary, "hold" is defined as "to own." In The Century Dictionary and Cyclopedia, "hold" is defined as "to own." In Funk and Wagnall's New Standard Dictionary, "hold" is defined as "keep as one's own, or simply to own or control."

The usual and ordinary meaning of the word "own" used so frequently in the definitions of the word "hold" is indicated in the following definitions thereof appearing in standard dictionaries: In Webster's New International Dictionary, "own" is defined as "to have or hold as property; to have rightful title to, whether legal or natural." In The Century Dictionary and Cyclopedia, "own" is defined as "to have and enjoy the right of property in." In Funk and Wagnall's New Standard Dictionary, "own" is defined as "to have the legal or rightful title to."

From the definitions of the words "held" and "owned" referred to above, it must be conceded that if the taxpayer is the "owner" of the property in question, then that property is "held" by the taxpayer. The usual and ordinary meaning of the word "owner" is indicated in the following definitions thereof appearing in standard dictionaries. In New English Dictionary, Oxford Edition, "owner" is defined as "one who owns or holds something as his own (though he may not be in possession)"; in The Century Dictionary and Cyclopedia, "owner" is defined as "one who has the legal or rightful title, whether he is the possessor or not;" in Webster's New International Dictionary, "owner" is defined as "one who has the legal or rightful title, whether the possessor or not."

B. The period during which property is "held" by a taxpayer commences with the date on which the ownership in the property is acquired by the taxpayer.

1. The usual and ordinary meaning of the word "acquired" is indicated in the following definitions thereof appearing in standard dictionaries. In The Century Dictionary and Cyclopedia, "acquire" is defined as "to get or gain, the object being something which is more or less permanent, or which becomes vested or inherent in the subject;" in Webster's New International Dictionary, "acquire" is defined as "to get as one's own; as to acquire a title;" in Funk and Wagnall's New Standard Dictionary, "acquire" is defined as "get as one's own."

In the following cases the courts and the Board of Tax Appeals have sustained the contention of the Commissioner and have determined that the period during which property is "held", as defined in Capital Gain Sections of the Revenue Acts, commences with the date of the acquisition of that property.

In the case of *Dunigan* v. *Burnet*, 66 F. (2d) 201, (C. A. D. C. June 5, 1933) the Court in discussing the definition of "Capital Assets" appearing in the Revenue Act of 1921, said at page 202:

> "In the sale of stocks, bonds or land bought for investment as an entirety, the applicability of the provisions of the statute depends solely on the question of the time of *acquisition*." (Italics supplied.)

In the case of *Hooper* v. *Commissioner*, 26 B. T. A. 758, the Board determined that a taxpayer who had acquired property on October 10, 1925, and sold the same at a profit on October 10, 1927, had not held the property for more than two years and said at page 760:

> "In order for the petitioner to get the relief here

sought, she must have held the property for more than two years from the time she *acquired* it * * *." (Italics supplied.)

In the case of *Shaffer* v. *Commissioner*, 28 B. T. A. 1294, the Board said at page 1309:

"The two-year period mentioned in Section 208(*a*) (8) begins to run from the date of petitioners *acquisition* of the property and not from the date of payment therefor or the date when additional costs in respect thereof were incurred." (Italics supplied.)

2. Section 206(*a*)(6) of the Revenue Act of 1921, by defining "Capital Assets" as those assets "*acquired* and held" for more than two years, expressly provided that the "holding period" began at the date of acquisition, and the taxpayer contends that no change in the law was made by the omission of the word "acquired" in the definition of "Capital Assets" in the Revenue Acts of 1924, 1926 and 1928. The following authorities and considerations support this contention:

(a) In *Helvering* v. *New York Trust Co.*, 292 U. S. 455, at page 469, Mr. Justice Butler, in commenting upon the "Capital Assets" Section, said: "In view of the inclusion of the *same* definition in the case of 1921, 1924 and 1926, and the legislative purpose underlying it, the contention that the new words were added to change the meaning of 'capital assets' as defined in the earlier acts is without force."

(b) No suggestion that the law was intended to be changed by the omission appears in the Reports of the Congressional Committees. H. R. 179, 68th Cong., 1st Sess., pages 19 and 20, S. R. 398, 68th Cong., 1st Sess., pages 21 and 22.

(c) As stated in the *First National Bank of Boston* v. *United States*, 76 F. (2d) 200, at page 202, the obvious reason for the omission was that the word "acquired" was regarded as surplus.

C. In interpreting the provisions of the Revenue Acts, the Supreme Court has held that the date of the acquisition by a residuary beneficiary of her interest in the estate of a decedent is the date of the death of the decedent even in those states where contrary to the rule in New Hampshire it is held that title to the personal property vests in the executor named in the will of the decedent.

In the case of *Brewster* v. *Gage*, 280 U. S. 327, it appeared that Brewster, Sr., died testate on May 20, 1918, a resident of Rochester, New York. Pursuant to a final decree of the Surrogate's Court entered on April 19, 1920, stocks were distributed to Brewster, Jr., one of the residuary legatees. He sold some of these stocks in 1920, 1921 and 1922 and in his income tax returns he computed profit or loss on each sale by comparing the selling price of the stock with its value at the date of the decree of distribution. The Commissioner of Internal Revenue held that the values of the stock at the date of the testator's death should be taken for the calculation of income and on that basis assessed for each year additional tax, which Brewster, Jr., paid under protest and thereafter brought an action to recover the amount so paid under protest. The District Court gave judgment for Brewster which was reversed by the Circuit Court of Appeals, and the judgment of the Circuit Court of Appeals was affirmed by the Supreme Court. Mr. Justice Butler rendered the opinion of the court and said at page 333:

> "It is necessary to construe the word 'acquired' and the phrase 'at the time of such acquisition' to determine whether the value of the stock at the time of testator's death or its value on the date of the decree should be used in the calculation.
>
> Upon the death of the owner, title to his real estate passes to his heirs or devisees. A different rule applies to personal property. Title to it does not vest at once

in heirs or legatees. *United States* v. *Jones*, 236 U. S. 106, 112. But immediately upon the death of the owner there vests in each of them the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution. *Sanders* v. *Soutter*, 136 N. Y. 97. *Vail* v. *Vail*, 49 Conn. 52. *Cook* v. *McDowell*, 52 N. J. Eq. 351. Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. *Foster* v. *Fifield*, 20 Pick. 67, 70. *Wager* v. *Wager*, 89 N. Y. 161, 166. *Thompson* v. *Thomas*, 30 Miss. 152,158.

Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property. And, notwithstanding the postponement of transfer of the legal title to him, Congress unquestionably had power and reasonably might fix value at the time title passed from the decedent as the basis for determining gain or loss upon sale of the right or of the property before or after the decree of distribution. And we think that in substance it would not be inconsistent with the rules of law governing the descent and distribution of real and personal property of decedents to construe the words in question to mean the date of death."

In the case of *Brewster* v. *Gage*, the Court was construing the word "acquired" appearing in Section 202 of the Revenue Act of 1921 but in the construction of that word it was necessary for the Court to determine the date on which the interest of a residuary legatee vests and the Court

found that that date was the date of the death of the testator. The taxpayer contends that the rule of law in the case of *Brewster* v. *Gage*, is controlling in this case. It must be conceded here that Mrs. Lee acquired her interest in the stocks in question on September 4, 1926, the date of the death of Mr. Glessner.

The Commissioner erroneously argues (McFeely Brief, 24-27) that Sec. 113(a) (5) of the Revenue Act of 1928 provides that a residuary legatee acquires his legacy at the time of distribution and that therefore the rule of *Brewster* v. *Gage*, 280 U. S. 327, that the time of acquisition in the case of a residuary bequest is the time of the death of the testator, was changed. The simple answer to this contention is that no such provision appears in this section, which is as follows:

> "Section 113(*a*). Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that— * * * (5) * * * In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *"

Obviously this section does not define the date of acquisition of a residuary bequest. Its purpose and effect as stated in *Brewster* v. *Gage*, 280 U. S. 327, 337, was to change the date on which the basis for determining gain or loss is fixed, in the case of a residuary bequest, from the date of acquisition to the time of distribution of the estate; it does not change the rule that the time of acquisition, in the case of a residuary bequest, is the time of the testator's death.

Mr. Justice Wilson, in the decision in *First National Bank of Boston* v. *United States*, 76 F. (2d) 200, (C. C. A. 1st, 1935) found support for the Court's conclusion that the

legacy there in question was acquired at the date of the death of the testator in the very words of Sec. 113(*a*) (5). He said at page 202:

> "It is significant, however, that even in paragraph (a) (5) of section 113 of the 1928 Revenue Act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides that, 'If personal property was acquired by specific bequest,' etc., and 'in all other cases if the property was *acquired either by will or by intestacy.*' (Italics supplied.)"

III.

The Commissioner erroneously contends that under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, the stocks here in question were not "held" by the taxpayer until they came into her physical possession.

From the stipulated facts it appeared that the stocks here in question were delivered to the taxpayer by the Executor of the estate of Mr. Glessner on October 6, 1927 (R., 14) and the Commissioner therefore contends "that the two year holding period of a general or residuary legatee should begin at the date of distribution." (McFeely Brief, page 28.) The taxpayer submits that this contention of the Commissioner should not be sustained for the following reasons:

A. The Commissioner has held, with reference to the similar Capital Gain Section of the Revenue Act of 1921, that the period of holding by a residuary beneficiary of personal property commences with the date of acquisition, which has been held to be the date of death.

In a letter from the Commissioner to Prentice-Hall, Inc. (Prentice-Hall Tax Service for 1923, pages 2703-4), the

Commissioner stated with regard to Section 206(a) (6) of the Revenue Act of 1921 defining "capital assets":

> "* * * Where property owned by the decedent at the time of his death is distributed to the beneficiaries of his estate, such property will be treated as having been acquired and held by the beneficiaries from the date of the decedent's death for the purpose of Section 206."

In Income Tax Ruling 1889 III-1 C. B. 70, the Commissioner has stated that under the definition of "Capital Assets" appearing in Section 206 (*a*) (6) of the Revenue Act of 1921, which is similar to the provisions of Section 101(*c*) (8) of the Revenue Act of 1928 here in question, the two-year period during which assets must be held in the case of property received under the terms of a will, commences with the date of the testator's death. This ruling was promulgated prior to June, 1924, and the pertinent portions thereof are as follows:

> "Advice is requested in regard to the Federal income tax liability arising from the sale by the taxpayer in 1922 of certain securities which he received in 1921 as part of his distributable share of the estate of his father, who died in 1919.
>
> The particular question raised is whether the two-year period during which capital assets must be held to entitle the taxpayer to the benefit of the provisions of section 206 of the Revenue Act of 1921 ran from the date of the testator's death or from the later date on which the beneficiary actually received possession of the securities.
>
> The question requires a determination of the meaning of that part of section 206 (*a*) (6) which provides:
>
> 'The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years * * *'
>
> It is well settled that the interest of a distributee of a decedent's estate attaches upon the date of the de-

cedent's death. Mr. Justice Holmes thus states the rule in *Hooper* v. *Bradford*, (1901) (178 Mass, 95, 97):

> 'The time when the property passes under a deed is not later than the death of the grantor. The same is true in the case of a will. It is true that in the later instance the interest of a legatee is subject to an account, but still it is an interest in the fund as it is, analogous to that of a *cestui que trust*, and vests at the death of the testator.'

To the same effect is *Mechanics' Savings Bank* v. *White*, (1889) (150 Mass., 234). • • •

In an article in 21 Harvard Law Review, 436, the result of the authorities is thus summarized:

> • • • 'Neither an executor nor an administrator takes any beneficial interest in the decedent's property. And on the death of the testator or intestate, both legatees and next of kin get an immediate interest in the personal estate analogous to that of a *cestui que trust*.'

The Department has adopted this doctrine in regulations and rulings, holding that a distributee of property from a decedent's estate acquires it at the date of the decedent's death for the purpose of determining gain or loss from its sale by such distributee. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34.)

Granted, then, that a distributee acquires an immediate interest in the decedent's estate at the date of the decedent's death, and that this interest is analogous to that of a *cestui que trust*, is this interest 'property acquired and held by the taxpayer' from the time of the death? In other words, does the quoted phrase embrace simply legal interests in possession, or does it further embrace the beneficial interest of a distributee, which later is converted into a legal interest by the actual distribution?

That Congress did not intend to require legal title and possession by the use of the terms 'acquired and held' in defining capital assets is strongly indicated by subdivision (*c*) of section 206, stating the method for the application of the section to cases of partnerships, estates, or trusts. The subdivision provides:

> 'In the case of a partnership or of an estate or

trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (*b*) of this section.'

These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section 206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. If the phrase 'property acquired and held by the taxpayer' in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (*c*) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned. Since the section should be construed so as to give effect to both provisions, rather than merely one (*Monroe Co.* v. *Riordan* (1922), 280 Fed., 624, 626), it appears that Congress did not intend the words 'property acquired and held by the taxpayer' to refer exclusively to legal property interests; but that beneficial interests in property are also included. Moreover, according to the doctrine of the cases quoted *supra*, a distributee of a decedent's estate has an interest vesting at the decedent's death analogous to that of a *cestui que trust;* section 206 (c) expressly grants to a *cestui* the privilege of determining his tax in the manner provided by that section; accordingly, the distributee should be accorded a like privilege. * * *"

These rulings of the Commissioner are still in effect as they have never been amended or revoked.

B. The rulings of the Commissioner interpreting the Capital Gain Section of the Revenue Act of 1921 must be deemed to have received legislative approval by the re-enactment of the provisions of the law referred to in the ruling, in the Revenue Acts of 1924, 1926 and 1928.

That the ruling of the Commissioner promulgated in 1924 in Income Tax Ruling 1889 quoted above must be deemed to have received legislative approval by the re-enactment of the provisions of the law referred to in the ruling, is clearly indicated in the following cases:

In the case of *Brewster* v. *Gage*, 280 U. S. 327, the Court said at page 337:

> "The substantial re-enactment in later Acts of the provision theretofore construed by the Department is persuasive evidence of legislative aproval of the regulation."

In the case of *U. S.* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, the Court said at page 466:

> "The administrative construction must be deemed to have received legislative approval by the re-enactment of the statutory provision without material change."

In the case of *Massachusetts Mutual Life Insurance Co.* v. *U. S.*, 288 U. S. 269, the Court said at page 273;

> "The Congress in the Revenue Acts of 1928 and 1932 re-enacted § 245 without alteration. This action was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute. * * *."

See also the case *Helvering* v. *Bliss*, 293 U. S. 144, 151, in which the rulings of the Commissioner which the Court

held had been approved by the re-enactment of the law, were a telegram, an Income Tax Ruling set forth in the Internal Revenue Bulletin, and a mimeographed instruction to Collectors.

C. Neither physical possession nor legal title to the property in question for two years is required in order that the property may be considered as "held" under the provisions of Section 101 (c) (8) of the Revenue Act of 1928.

In each of the following situations it has been held or the Commissioner has ruled that neither physical possession nor legal title to the property in question for two years is required in order that the property may be considered as "held" under the provisions of said Section 101 (*c*) (8).

(1) The beneficiary of an estate or trust having neither physical possession nor legal title to the property held by the Trustee which is sold, is given the privilege of computing his tax under the provisions of Section 101, by reason of the provisions of Section 168 of the Revenue Act. The inconsistency of the present contention of the Commissioner with his former rulings is particularly apparent at this point in the argument. In Income Tax Ruling 1889 III—1 C. B. 70, previously referred to, the Commissioner said:

> "That Congress did not intend to require legal title and possession by the use of the terms 'acquired and held' in defining capital assets is strongly indicated by subdivision (c) of section 206, stating the method for the application of the section to cases of partnerships, estates, or trusts. • • •
>
> These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section 206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. If the phrase 'property acquired and held

by the taxpayer' in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (*c*) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned."

(2) A donee who has had physical possession and legal title to property for less than two years may treat the gain arising upon the sale of the property as "capital gain" if the combined period of holding by the donor and donee exceeds two years.

Helvering v. *New York Trust Co.*, 292 U. S. 455.

(3) When stock is declared as a stock dividend and is immediately thereafter sold, the stock so received is considered as "held" for more than two years if the stock upon which the dividend was declared has been held for more than two years. Clearly the date of the distribution and delivery of the stock dividend is not considered as the date on which the holding commences. In Regulations 74 relating to the income tax under the Revenue Act of 1928, the following appears as a part of Article 501:

"If the taxpayer has held for more than two years stock upon which a stock dividend has been declared, both the original and dividend shares are considered to be capital assets."

(4) If rights to subscribe to stock are declared and immediately sold, such rights are considered as held for more than two years by the holder of the original shares if the holder of the original shares has held the original shares for more than two years. Clearly the date of the distribution and delivery of the stock rights is not considered as the date on which the holding commences. In a memorandum of the General Counsel of the Bureau of Internal Revenue G. C. M. 11645, XII-1 C. B. 117, the General Counsel of the Bureau of Internal Revenue has stated:

"Where the stock rights are sold, it is the opinion

of this office that in determining the period for which the taxpayer has held the property, there should be included the period for which he held the stock with respect to which the rights were issued. • • • The regulations have provided from the beginning that if the taxpayer has held for more than two years stock upon which a stock dividend has been declared, both the original and the dividend shares are considered to be capital assets, and it is the opinion of this office that the same treatment must be accorded to the sale of stock rights which are analogous thereto."

See also *Insull* v. *Commissioner*, 32 B. T. A. No. 161.

(5) In the following cases it has been held by the Board of Tax Appeals and the Circuit Courts of Appeal that property is "held" by a taxpayer within the meaning of the Capital Gain Section of the Revenue Act if the taxpayer has an equitable title therein even though the legal title to the property is vested in a trustee and not in the taxpayer.

Hay v. *Commissioner*, 25 B. T. A. 96,
Phipps v. *Commissioner*, 54 F. (2d) 469 (C. C. A. 2, December 7, 1931).

(6) When stock is purchased on margin, the stock is not issued in the name of the purchaser nor is it delivered to the purchaser until the debit balance has been paid but neither the date on which the transfer of the certificate is made on the books of the company nor the date on which the certificate is delivered to the purchaser is material. If the purchaser purchased the stock more than two years prior to the date of its sale, it is considered that he has "held" that stock from the date of the purchase and is entitled to return the profit, if any, as a "capital net gain." Income Tax Ruling 1818, II-2 C. B. 39.

In the case of *Schwinn* v. *Commissioner*, 9 B. T. A. 1304, the Commissioner treated stock purchased on margin, the

certificates for which were never issued in the name of the purchaser or delivered to the purchaser, as, nevertheless, "held" by the purchaser from the date of purchase.

(7) Where the owner for more than two years of a membership in a stock exchange which increased its membership and issued to each old member a one-quarter interest in a new membership, sold his interest in the new membership immediately upon the receipt thereof, he was held by the Commissioner of Internal Revenue to be entitled to treat the gain upon the sale of the new membership as a capital gain, although the distribution and delivery of the new membership was within two years from the date of the sale thereof. Income Tax ruling 2466 VIII-1 C. B. 95.

(8) In the case of *Bradbury* v. *Commissioner*, 353-A, C. C. H. 10107, the Circuit Court of Appeals for the Sixth Circuit held that stock acquired by the taxpayer under the provisions of an agreement, although never delivered, received or held by the taxpayer, which was sold more than two years after the execution of the agreement was "held" by the taxpayer and the profit realized upon the sale thereof was taxable as a "capital net gain".

(9) The Commissioner will no doubt concede that the owner of a remainder interest in real estate which is subject to a life estate does not have physical possession of that real estate, but nevertheless if he sells it after owning it for more than two years this real estate will be considered as "held" by him under the provisions of Section 101 (c)(8).

(10) The Commissioner will no doubt concede that one who purchases real estate subject however to a long term lease does not have physical possession of that real estate, but nevertheless if he sells it more than two years after

he purchased it, this real estate will be considered as "held" by him under the provisions of Section 101 (c)(8).

(11) The Commissioner will no doubt concede that had Mr. Glessner made a specific bequest to the taxpayer of the stocks here in question and had that stock been transferred and delivered to her, as here, in 1928 and sold by her, as here, in 1929, she would not have had physical possession of these stocks for more than two years and yet they would be considered as "held" by her for more than two years under the provisions of said Section 101(c)(8).

The contention of the Commissioner that under the provisions of said Section 101(c)(8) property is not "held" by a residuary legatee until physical possession thereof is obtained introduces differences in the definition of the word "held" appearing in the various Revenue Acts for which there is no basis whatsoever. It must be conceded that the word "held" where used in similar sections of the Revenue Acts of 1921, 1924, 1926 and 1932 does not connote physical possession nor does it in the Revenue Act of 1928 when referring to property acquired by a specific legatee.

From the foregoing it must appear that delivery and distribution of the property in question to the owner thereof has never been determinative of the time when the property was first "held" by the owner thereof. Neither physical possession nor legal title has ever been considered an essential element in the definition of the word "held" as used in the Capital Gain Section of the Revenue Acts. The time when ownership commences is the time that the period of holding commences. Legal title is not necessary, a vested, indefeasible, equitable ownership is sufficient. Upon the death of Mr. Glessner, the taxpayer acquired her right of ownership in the residue of his estate, all the benefits of ownership therein were acquired by her as of that

date and it must therefore be determined that her portion of the residue of that estate was "held" by her from the date of the death of Mr. Glessner to the date on which she disposed of the same, which was for a period of more than two years.

IV.

The Commissioner erroneously contends that Sections 101(c)(8) and 113(a)(5) of the Revenue Act of 1928 must be read together and that it was the intention of Congress that the two-year holding period of a general or residuary legatee should begin at the date of distribution.

This contention of the Commissioner is set forth at pages 14 to 28 of the McFeely brief and was approved by the Circuit Courts of Appeal in the cases which are to be argued with this case, *i. e., Rand* v. *Helvering,* No. 439, *Ogle* v. *Helvering,* No. 137 and *Dibblee* v. *Commissioner,* No. 494.

There was included in the Revenue Act of 1921 under the title "Basis for Determining Gain or Loss" the following:

> "Section 202(*a*). That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that— * * *
>
> (3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. * * *"

This was re-enacted in substantially the same language in the Revenue Act of 1924 as Section 204(*a*)(5) and in the Revenue Act of 1926 as Section 204(*a*)(5).

A substantial change in the section of the law providing for the basis for determining gain or loss was made in the Revenue Act of 1928. The pertinent provisions of the Revenue Act of 1928 are as follows:

> "Section 113(a). Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that— * * * (5) Property transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *"

From the foregoing, it should be noted that under the Revenue Acts of 1921, 1924 and 1926, the basis for determining the gain or loss upon the sale of personal property acquired by a residuary beneficiary was the fair market value of such property at the time of such acquisition which the case of *Brewster* v. *Gage*, 280 U. S. 327, determined to be the date of death of the testator. By the Revenue Act of 1928, the basis for determining the gain or loss upon the sale of personal property acquired by a residuary beneficiary was changed to the fair market value of the property at the time of the distribution to the taxpayer.

A. Section 101(c)(8) of the Revenue Act of 1928 does not adopt or incorporate in its provisions any part of Section 113(a)(5) of that Act. Said Section 113(a)(5) does not purport to limit, control or modify the provisions of said Section 101(c)(8).

Section 101 of the Revenue Act of 1928 deals exclusively with the subject of "Capital Net Gains and Losses." Section 101(*c*)(8) determines and specifies the period during which property however acquired must be held if the profit thereon when sold is to be taxable at 12½%. This is accomplished by defining "capital assets" as property held, which means owned, by the taxpayer for more than two years and by stating that the profit upon the sale of capital assets may be taxable at 12½%.

Section 113 of the Revenue Act of 1928 deals exclusively with the entirely separate and distinct subject of the "Basis for Determining Gain or Loss." Section 113(*a*)(5) fixes as the basis for determining the gain or loss from the sale or other disposition of personal property acquired after February 28, 1913, by a residuary legatee, the fair market value of the property at the time of the distribution to the taxpayer. There is no provision of Section 113(*a*)(5) which purports to direct the time of the acquisition of ownership or the beginning of the holding or owning of personal property by a residuary legatee.

There is nothing in said Section 101(*a*)(8) which can be construed as incorporating therein the provisions of said Section 113(*a*)(5) or from which it can be implied or inferred that the "basis date for valuation" fixed by said Section 113(*a*)(5) is adopted or incorporated in said Section 101(*c*)(8) as the date from which the two-year holding period shall run. The two sections cover absolutely separate and distinct subjects which are entirely independent and unrelated to one another.

Under the provisions of Section 113(*a*)(5) the taxpayer must first compute the gain resulting from the sale of personal property acquired by him as a residuary legatee and having thus ascertained the amount of the gain he must then determine, pursuant to the provisions of Section 101(*c*)(8), whether or not the property has been "held" by him for more than two years after the date of its acquisition, namely, the date of the death of the testator. If it is then determined that the property has been held by him for more than two years from the date of the death of the testator, the property can then be considered by him as "capital assets" under the provisions of Section 101(*c*)(8) and the amount of gain, computed upon the basis prescribed under Section 113(*a*)(5), at his option, may be returned as "capital net gain" instead of as "ordinary net income."

Each section is used for a separate and distinct purpose. Section 113(*a*)(5) is used to determine the amount of the taxable gain. Section 101(*c*)(8) is used to ascertain whether the amount of gain upon the sale of property acquired by a residuary legatee may be taxable as "capital net gain" rather than "ordinary net income."

B. In enacting Section 113(a)(5) of the Revenue Act of 1928 which effected a change in the law as to the "basis date" for determining gain or loss from the sale of property transmitted at death, Congress did not intend thereby to modify or change the interpretation of the provisions of Section 101(c)(8) which was not changed by the Revenue Act of 1928.

The legislative history of a law enacted by Congress should be considered in construing that law, and the law should be construed to carry out the legislative intent.

U. S. v. *Flores*, 289 U. S. 137, 149.

Gulf States Steel Co. v. *U. S.*, 287 U. S. 32, 45.

The reports of the legislative committees should be considered in construing a law as those reports are indicative of the intent of Congress in enacting the law.

U. S. Cartridge Co. v. *U. S.*, 284 U. S. 511, 516.

1. The legislative history of Section 113(a)(5) of the Revenue Act of 1928 shows clearly that Congress did not intend by that enactment to modify or change the interpretation of the provisions of Section 101(c)(8) of that Act.

The Commissioner at page 16 of the McFeely brief erroneously contends that "Congress, in establishing the date of distribution for valuation as the basis for determining the gain * * *, certainly intended that the same date should measure the period such property was held by the taxpayer * * *."

The legislative history of the enactment of Section 113(*a*)(5) of the Revenue Act of 1928 and the reports of the various committees of Congress with reference to the changes made by that section clearly shows that Congress did not intend thereby to modify or in any manner change the interpretation of the provisions of Section 101(*c*)(8) of that Act.

The first sentence of Section 113(*a*)(5) of H. R. 1, 70th Cong., 1st sess., as originally introduced, was as follows:

> "If the property was acquired by bequest, devise, or inheritance, or by a decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of the death of the decedent."

The first sentence of the section quoted above is identical with Section 204(*a*)(5) of the 1926 Act, except for the insertion of the words "or by a decedent's estate" and for the substitution at the end of the sentence of the words "at the time of the death of the decedent" for the words "at such time of such acquisition." This change was rec-

ommended to Congress by the Joint Committee on Internal Revenue Taxation in order "to make the basis certain and definite" and avoid the doubt as to what is meant by the date of acquisition. (See Report of Joint Committee, Vol. 1, pp. 17, 74, 75). The Ways and Means Committee Report No. 2, p. 18, 70th Cong., 1st sess., indicates that it accepted the Joint Committee's recommendation in the following language:

> "In view of the decision of the Court of Claims in *McKinney* v. *United States*, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death and this rule is incorporated in Sec. 113(*a*)(5).
>
> It is also provided in the same paragraph that the basis in the case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.
>
> Under existing law the basis in such a case is the value at the date of 'acquisition', which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determined basis."

The bill as passed by the House was then sent to the Senate and referred to the Finance Committee on December 17, 1927, and that committee on May 1, 1928 (*Senate Finance* Committee Report No. 960, 70th Cong., 1st sess.) reported the bill out with certain amendments. The Committee Report, with reference to Sec. 113 (p. 28), reads as follows:

> "The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in Sec. 113(*a*)(5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides

the same basis shall be used where the property is sold by the beneficiary. It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death cannot properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the Committee has revised Sec. 113(*a*) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty, or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

As submitted to the Senate by the Finance Committee, with its accompanying report, the section under discussion appears as follows, the portions in italics being the section as originally passed by the House, and the remaining portion representing the section as amended by the Senate:

"(5) PROPERTY TRANSMITTED AT DEATH.—*If the*

property was acquired by bequest, devise, or inheritance, or by a decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of the death of the decedent. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in section 402 (c) or (e) of the Revenue Act of 1921, or in section 392 (c) or (f) of the Revenue Act of 1924 or the Revenue Act of 1926 (relating to transfers in contemplation of or intended to take effect at or after death and to property passing under power of appointment.) If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer;"

The foregoing amendment by the Senate, numbered 75, and the amended bill as passed by the Senate, was sent to the Committee on Conference, which on May 25, 1928, reported it to the House of Representatives (Conference Report No. 1882, H. R., 70th Cong., 1st sess.) with the following recommendation, (p. 3):

"Amendment numbered 75. That the House recede from its disagreement to the amendment of the Senate numbered 75 and agree to the same with an amendment as follows:

On page 14 of the Senate engrossed amendments, at the end of line 14, insert a period and the following:

In the case of property transferred in trust to pay the income for life to or upon order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property

after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

And the Senate agree to the same."

Sec. 113(a) (5) of the Revenue Act of 1928 was finally adopted with the amendment agreed to in the Conference Committee.

At no stage in this legislation is there evident any intent of Congress to effect any modification in the intepretation of the provisions of Section 101(*c*) (8) of the Revenue Act of 1928 by the changes made in Section 113(*a*) (5). The language used in Section 113(*a*) (5) and the legislative history of the enactment of that portion of the law shows conclusively that its adoption in no manner affected or qualified or was intended to affect or qualify said Section 101(*c*) (8) and shows that the "basis date for valuation" in determining gain or loss on the sale of personal property acquired by a residuary beneficiary under the provisions of Section 113(*a*) (5) is in no way related to but on the contrary is entirely independent of, distinct from and in contrast to the date of acquisition of the property by the residuary legatee.

2. That Congress recognized that Section 113(a)(5) of the Revenue Act of 1928 did not modify or change the interpretation of Section 101(c)(8) of the Revenue Act of 1928 and recognized that said Section 113(a)(5) provided one date for the "basis date for valuation" and recognized that said Section 101(c)(8) provided for a different date for the commencing of the period during which personal property is "held" by a residuary legatee, is clearly evidenced by the change made in the provisions of the "Basis for Determining Gain or Loss" Section of the Revenue Act of 1934.

By Section 113(*a*) (5) of the Revenue Act of 1934 the "basis" for personal property acquired by a residuary bene-

ficiary was changed from the value at the date of distribution as provided in the Revenue Act of 1928 to the value at the time of acquisition. The provisions of Section 113(*a*) (5) of the Revenue Act of 1934 are as follows:

> "(5) Property transmitted at death.—If the property was acquired by bequest, devise or inheritance, or by the decedent's estate from the decedent, *the basis shall be the fair market value of such property at the time of such acquisition.* * * *" (Italics supplied.)

It should be noted that the portion of the Section of the Act in italics is identical with the similar portion of the "Basis" Section of the Revenue Acts of 1921, 1924, and 1926.

The Committee on Ways and Means, in its report (Committee on Ways and Means Report 704, 73rd Cong., 2nd sess., p. 27) stated with respect to the change made in Section 113(*a*) (5):

> "Under section 113 (*a*) (5) of the Revenue Act of 1932, the basis for determining gain or loss, for income-tax purposes, on the sale or other disposition of property transmitted at death, is, in the following cases, the fair market value thereof at the time of the death of the decedent:
>
> (1) Where personal property was acquired by specific bequest;
>
> (2) Where real property was acquired by general or specific devise, or by intestacy;
>
> (3) Where the property, real or personal, was acquired by the decedent's estate from the deceased.
>
> In all other cases, if the property was acquired by will or intestacy, the basis is the fair market value of the property at the time of distribution to the taxpayer.
>
> Included within the phrase 'all other cases' is personal property acquired by general or residuary bequest. Thus, where a trustee acquires personal property by general bequest, the basis of the property on a

sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of the decedent's death.

Oftentimes, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other according to which will most benefit the estate. The trustee, of course, may use a later basis than the executor, and where it is desired to sell personal property subject to a trust during the period of administration, the executor-trustee may determine whether it would be most advantageous to sell as executor or as trustee. Where the personal property has increased in value in the hands of the executor, under a general bequest, the property may be distributed to the trustee, who may use the higher basis in computing gain or loss on the sale, thereby diminishing the taxable increment and greatly reducing or entirely avoiding the income tax.

Section 113(*a*) (5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 Act. The change in the 1928 Act was made because there was some doubt as to the meaning of the term 'date of acquisition,' which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage,* 280 U. S. 327.) Section 113 (*a*) (5) of the bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal."

From the foregoing it must be perfectly apparent that Congress recognized that Section 113(*a*) (5) or the Revenue Act of 1928 did not modify or change the interpretation of Section 101(*c*) (8) of the Revenue Act of 1928, and recognized that said Section 113(*a*) (5) provided one date for the "Basis Date for Valuation" and recognized that said Section 101(*c*) (8) provided for a different date for the

commencing of the period during which personal property is "held" by a residuary legatee.

3. It cannot be held that Congress intended that Section 113(a)(5) of the Revenue Act of 1928 should modify or change the interpretation of Section 101(c)(8) of the Revenue Act of 1928 because in those instances where Congress desired that the "Capital Gain" Section should be modified by the "Basis for Determining Gain or Loss" Section, specific provision was made with reference thereto in the "Capital Gain" section.

The pertinent provisions of Section 101(*c*) (8) (A), (B) and (C) of the Revenue Act of 1928 are as follows:

> "(8) 'Capital assets' means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purpose of this definition—
>
> (A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.
>
> (B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.
>
> (C) In determining the period for which the taxpayer has held stock or securities received upon a dis-

tribution where no gain is recognized to the distributee under the provisions of section 112 (*g*) of this title or under the provisions of section 203 (*c*) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution."

This was a re-enactment of substantially the same language appearing in the Revenue Act of 1926 which introduced for the first time into the law the provisions now appearing in Paragraphs (A), (B) and (C) of Section 101(*c*) (8) set forth above.

Under the Revenue Act of 1924 and the Revenue Acts prior thereto, there were many instances in which the "Basis Date for Valuation" used in determining the amount of gain or loss was not identical with the date used in determining the commencement of the period of holding. Congress in Section 101(*c*) (8) of the Revenue Act of 1926 and in Section 101(*c*) (8), (A), (B) and (C) of the Revenue Act of 1928 intended to permit the taxpayer in certain cases enumerated therein to add to the time of his actual "holding period" the time of other separate and distinct "holding periods." Obviously Paragraphs (A), (B) and (C) of Section 101(*c*) (8) quoted above have no connection with Section 113(*a*) (5).

That Congress did not intend that Section 113(*a*) (5) of the Revenue Act of 1928 should modify or change the interpretation of Section 101(*c*) (8) of the Revenue Act of 1928 is clearly shown upon an examination of the legislative history of Section 101(*c*)(8), (A), (B) and (C). These paragraphs of the law appeared for the first time in the Revenue Act of 1926.

The following appears in the Report of the Committee on Ways and Means accompanying H. R. No. 1, Rept. No. 1,

Union Calendar No. 1, 69th Cong., First sess., page 6, with reference to the proposed change in the "Capital Gain" section of the Revenue Act:

> "The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years. Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact the question frequently arises as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The amendment proposed to this section incorporates in the law the present regulation of the Treasury and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gain and loss under this section. The same question arises in the case of property received by gift after December 31, 1920. The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section."

The Committee on Finance in the Senate, in its report accompanying H. R. No. 1, Rept. No. 52, Calendar No. 54, 69th Cong., 1st sess., incorporated the House Committee's statement.

From the foregoing, it appears that when Congress has intended that the "Capital Gain" Section should be modified by the "Basis for Determining Gain or Loss" Section of the law, it has made specific provision with reference thereto in the "Capital Gain" Section. It must therefore follow that Congress did not intend that Section 113(*a*) (5) of the Revenue Act of 1928 should modify or change the in-

terpretation of Section 101(*c*) (8) of the Revenue Act of 1928 as no specific provision was made in Section 101 of the Revenue Act of 1928 with reference thereto. The enactment of the specific provisions of Paragraphs (A), (B) and (C) of Section 101(*c*) (8) of the Revenue Act of 1928 indicates clearly that where Congress intended that Section 101 was to be modified by Section 113 it expressly provided therefor and indicates clearly that it was the intention of Congress that except where it expressly so stated, the interpretation of Section 101(*c*) (8) was not to be modified or changed by any change made in the provisions of Section 113.

The contention of the Commissioner that Sections 101 and 113 of the Revenue Act of 1928 must be read together was considered by the Circuit Court of Appeals in the case of *The First National Bank of Boston* v. *United States*, 76 F. (2d) 200. Mr. Justice Wilson delivered the opinion of the Court and said at page 202:

> "Sec. 101 and Sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.
>
> In other words, Congress intended only by the change in Sec. 113 (a) (5) of the 1928 Act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the Administrative Bureau as to date of acquisition of such property. It, however, made no substantial change in Sec. 101 of that Act from the provisions of Sec. 208 (a) (8) of the 1926 Act for determining what are capital assets.
>
> In view of the purpose, which has repeatedly been recognized both by the Administrative Bureau and the courts of allowing a gain from the sale of property held

for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the Revenue Acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the government in construing Sec. 113 (a) (5) of the 1928 Act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for computing gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by Sec. 113 (a) (5) of the Act of 1928 to effect a change in the period during which property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in Sec. 101 of that Act.

There is nothing new in fixing an arbitrary date for determining the base value for computing gain or loss in the sale of property and different from that when the property was acquired by the taxpayer. In case of property purchased prior to 1913, it was fixed as of March 1, 1913, unless the cost price was in excess of their value on that date; also see Sec. 208 (a) (8) of the 1926 Act, and see Sec. 113 (a) (1) (2) (3) (4) (6) of the 1928 Act."

The taxpayer submits that this determination by the Circuit Court of Appeals for the First Circuit was correct.

V.

The Commissioner erroneously contends that, "It is not logical to presume that Congress deliberately fixed a date for determining the basis of property wholly without regard for the date when the two-year holding period should begin."

No authority is stated for this proposition that Section 101(c)(8) must be construed as though amended by Section

113(a)(5) of the Revenue Act of 1928 for indeed there is no authority therefor. There is, however, ample authority for the contrary proposition which the taxpayer contends to be the law, that under the Revenue Acts heretofore in effect and now in effect, there are many instances which have been recognized by the Commissioner, the Board of Tax Appeals and the Courts in which the date when the period of holding commences under the "Capital Gain" Section of the law is different from the "Basis Date for Valuation" as fixed by the "Basis for Determining Gain or Loss" Section of the law.

It is submitted that in the majority of cases in which the cost of the property held is the basis for the determining of the gain or loss upon the sale thereof the date on which the cost is fixed will have no relation to the time when actual ownership begins. Cost in many cases will be determined before or after and not always at the same time that ownership begins.

In the case of *Shaffer* v. *Commissioner*, 28 B. T. A. 1294, it appeared that Shaffer acquired stock in the Louisville Herald Company in 1910 at a cost of $239,580 and the value thereof on March 1, 1913 was equal to the cost thereof. In financing the Louisville Herald Company he made expenditures of large sums of money in 1923 and in 1924 which were included in computing the cost of that stock to him. He sold the stock of Louisville Herald Company and sustained a loss in 1924 and sustained further losses in connection with the sale of the property in 1926. Shaffer contended that he was entitled to take the losses as ordinary net losses in the years 1924 and 1926 but the Board held that although the payments made by him on account of this stock in 1924 and 1926 were to be considered in computing the cost of the stock to him, nevertheless as he had acquired title to the stock prior to March 1, 1913, he had therefore

held the stock for more than two years and the loss sustained upon the sale of the stock should be treated as a "Capital net loss." Obviously in this Shaffer case the date of acquisition of the stock by Mr. Shaffer was a date different from the date upon which payments were made by him which were used in determining the cost of the stock to him and it was not held that the law should be construed in such a manner as to make these two dates identical.

In the case of property bought pursuant to the provisions of an option contract the price paid for the property is of course determined as of the market value or the agreed value at the date of the option contract. The date of acquisition of ownership in the property is obviously a later date than when the option is exercised, and yet the Revenue Act cannot be so construed as to make the date for determining the cost, identical with the date of acquisition of the ownership of the property.

In the case of grain purchased for future delivery the "basis date for determining valuation" is obviously the date on which the contract is made and not the date on which the delivery of the grain is made. Delivery of the grain is made at a later date and the Revenue Act has never been construed in such a manner as to make the "basis date for valuation" identical with the date of acquisition of ownership in the grain.

In the case of property acquired before 1913, the Revenue Acts have expressly provided the arbitrary date of March 1, 1913, for determining the basis of value and this is without reference to the date when the holding period begins.

From the foregoing it must therefore appear that there have been and now are many instances in which the date for determining the basis for gain or loss is fixed wholly without regard to the date when the holding period begins,

and the fact that this may be illogical should be immaterial to the Court; the remedy, if it is necessary that Revenue Act be logical, is to be sought in Congressional action.

VI.

The case of Helvering v. New York Trust Co. was erroneously relied upon by the Circuit Courts of Appeal in the cases of Rand v. Helvering and Ogle v. Helvering, and is erroneously cited by the Commissioner as authority controlling the decision of this case.

At pages 17 to 23 of the McFeely Brief the Commissioner contends that the case of *Helvering* v. *New York Trust Co.*, 292 U. S. 455 is controlling in the issues here involved. That case presented the question of whether or not gain arising from the sale of property transferred by gift could be returned by the taxpayer as "Capital Net Gain" under the provisions of the Revenue Act of 1921. The Commissioner contended that in the absence of express language in the 1921 Act permitting the adding of the donee's tenure of ownership of the property to the tenure of ownership of the donor, notwithstanding the fact that the donee was bound by the donor's basis for determining the gain or loss under Section 206 (a) (6) of that Act, the construction of Section 202 (a) (2) required that the period of the donee's holding within the definition of "Capital Assets" commenced to run from the date of the gift. This Court (Justices Roberts, Brandeis and Stone dissenting) held that the taxpayer was entitled to the benefit of the Capital Gain section. Mr. Justice Butler who delivered the opinion of the Court, stated that the amendment of the Capital Gain Section, which was made in 1926 by adding to the definition of "Capital Assets" a sentence to the effect that in determin-

ing the period for which the taxpayer held property, "there shall be included the period for which such property was held by any other person," if under the cost basis section, such property has the same basis for the purpose of determining the amount of gain or loss as it would have had in the hands of such other person, was merely declaratory of the law as it had existed prior to the 1926 Act, and said, in part:

> "No valid ground has been suggested for requiring tenures to be added for the one purpose and forbidding combination for the other. The legislative purpose to be served by the application of the lower rate upon capital gains is directly opposed to the Commissioner's construction. There is no ground for discrimination such as that to which the trustee was subjected. It is to be inferred that Congress did not intend penalization of that sort."

The taxpayer submits that differences in the facts of the New York Trust Company case and this Lee case make it inapplicable as a controlling precedent in this Lee case; that the underlying policy there announced supports the contention of the taxpayer here; and that there is nothing in the decision that furnishes authority for the contention made by the Commissioner in this Lee case, that since the basis for determining gain or loss to the taxpayer was determined at the date of distribution, the "holding period" should begin at the same time.

In the New York Trust case large profits had accumulated, these profits were measured for income tax purposes by the difference between the basis of the donor, which was the cost of the gift, and the selling price of the donee; and the impelling reason for this decision was admittedly found not in the express language of the "Capital Gain" section but in the purpose of that section to relieve the taxpayer

from excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions.

Before this decision Congress had expressed its intent by enacting the provision in the Revenue Act of 1926 which permitted the addition of the "holding period" of donors and donees for the purposes of the two-year limitation. Therefore, it seems that the decision was merely another manifestation of the general tendency to liberalize the "Capital Gain" section of the Act. See *Helvering* v. *Bliss*, 293 U. S. 144.

In this Lee case, there is only one tenure, that of the taxpayer, and this the Commissioner contends should be curtailed for the sake of logic and consistency. It is one thing for the Court as in the New York Trust case to liberally construe a tax provision which was enacted for the benefit of taxpayers, so as to permit a taxpayer who does not come within its express terms, to have the benefit of it; but it would be quite a different matter for this Court to construe such a tax provision so as to deny the benefit of that provision to a taxpayer who is within the express terms of the exemption. Here, a normal construction of the Revenue Act will give relief to a taxpayer who has realized large gains from the conversion of property actually held for more than two years.

Insofar as the Commissioner finds authority in the New York Trust Co. case for his theory that the "basis" date and the date on which the holding period begins should coincide, he is in error. There, it was not decided that the time during which the donee had held his gift began at the time the basis for determining gain or loss was fixed, but that the tenures of a donor and donee whatever they may be, for the purposes of the "Capital Gain" section, may

be added together, regardless of the time that the basis for determining gain or loss was fixed.

Mr. Justice Wilson, who delivered the decision of the Court in the case of *First National Bank of Boston*, v. *United States*, 76 F. (2d) 200 (C. C. A. 1st, 1935), was correct in saying, at page 203:

> "We find nothing in the decisions in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, or *Helvering* v. *Bliss*, 293 U. S. 144, which modifies the rule laid down by the Supreme Court in *Brewster* v. *Gage*, *supra*, * * *."

VII.

The principles of law announced in Crooks v. Harrelson and in like cases should be controlling in this Lee case.

In the case of *Crooks* v. *Harrelson*, 282 U. S. 55, the Court said at page 60:

> "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority and not with the courts."

and at page 61:

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In *United States* v. *Merriam*, 263 U. S. 179, 187-188, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quote with approval the words of Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might

otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The erroneous decisions of the Circuit Courts of Appeal in the Dibblee, Ogle, and Rand cases and of the Board of Tax Appeals in the McFeely case which was affirmed by the Circuit Court of Appeals for the Third Circuit by *per curiam* opinion in which it was held that Section 101(*c*)(8) of the Revenue Act of 1928 must be construed as though amended by Section 113(*a*)(5) of that Act in order that the Revenue Act of 1928 may be "consistent" are clearly flagrant examples of judicial legislation which are contrary to the facts and to the rule of the law announced in the foregoing cases and contrary to the practical effect of the operation of the Revenue Act in the various transactions enumerated above.

CONCLUSION.

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

HUGH W. MCCULLOCH,
Attorney for Respondent.

October 19, 1935.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 439

RUFUS R. RAND, JR., PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 439

RUFUS R. RAND, JR., PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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[fol. a] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 60784

RUFUS R. RAND, JR., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER EXTENDING TIME TO FILE RECORD TO JANUARY 21, 1935

For cause appearing of record it is

Ordered that the time for transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Eighth Circuit be and it is hereby extended to January 21, 1935.

Eugene Black, Member.

Dated: Washington, D. C., Dec. 24, 1934.

Now, December 27, 1934, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

(Endorsed:) Filed in the United States Circuit Court of Appeals for the Eighth Circuit on January 10, 1935, E. E. Koch, Clerk.

BEFORE U. S. BOARD OF TAX APPEALS

[Title omitted]

Appearances:

For Taxpayer: Howe P. Cochran, Esq.
For Comm'r: E. L. Corbin, Esq., James K. Polk, Esq.

[fol. 2] DOCKET ENTRIES

1931.

Dec. 7—Petition received and filed. Taxpayer notified. (Fee paid.)
" 7—Copy of petition served on General Counsel.

1932.

Feb. 4—Answer filed by General Counsel.
" 12—Copy of answer served on taxpayer. General Calendar.
Mar. 15—Motion to strike answer filed by taxpayer. 3/19/32 copy served.
" 18—Hearing set April 13, 1932, on motion. 3/19/32 copy served.
Apr. 13—Hearing had before Mr. Goodrich, Div. 11 on petitioner's motion to strike answer—granted—exception to Commissioner.
" 13—Order granting motion and Commissioner allowed 60 days to amend answer entered.
Jun. 6—Amended answer filed by General Counsel. 8/5/32 copy served.
Nov. 21—Hearing set for week of Dec. 7, 1932 at St. Paul, Minn.
" 22—Motion for 60 days continuance filed by taxpayer. 12/1/32 granted and restored to D. C. Calendar.
Dec. 29—Hearing set 2/1/33.

1933.

Jan. 20—Motion for continuance to Circuit Calendar at St. Paul, filed by taxpayer. 1/23/33 granted.
Jun. 1—Hearing set for week of July 10, 1933 at St. Paul, Minn.
" 12—Motion for continuance to 9/1/33 at St. Paul, filed by taxpayer. 6/13/33 granted—6/14/33 copy served.
" 13—Hearing set June 21, 1933 on motion. 6/14/33 copy served.

1934.

Jan. 12—Hearing set for week of 3/19/34 at St. Paul, Minn.

Mar. 23—Hearing had before Mr. Lansdon, Div. 8 on merits. Submitted. Stipulation of facts filed. Called 3/19/34.

[fol. 3] Apr. 5—Transcript of hearing of March 23, 1934 filed.

May 24—Memorandum opinion rendered, Mr. Lansdon, Div. 8. Decision will be entered in conformity with stipulation.

" 28—Decision entered, Div. 8.

Jun. 1—Order amending memorandum opinion of May 24, 1934 entered.

Jul. 23—Motion to vacate decision and for rehearing filed by taxpayer.

Aug. 25—Order vacating decision of May 28, 1934 entered.

Sep. 13—Order re-entering decision of May 28, 1934 and denying motion to vacate entered.

" 13—Decision entered, Mr. Turner, Div. 8.

Oct. 26—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by taxpayer.

Oct. 26—Proof of service filed.

Nov. 24—Agreed statement of evidence lodged.

" 27—Notice of lodgment of statement of evidence with hearing notice Dec. 7, 1934 filed.

Dec. 4—Agreed statement of evidence approved and ordered filed.

" 17—Præcipe with proof of service thereon filed.

" 24—Order enlarging time to January 21, 1935 for transmission and delivery of the record sur petition for review entered.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION OF R. R. RAND, JR.—Filed December 7, 1931

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency [fol. 4] (IT:AR:D-1 HBA-60-D) dated November 5, 1931, and as a basis for his proceeding alleges as follows:

1. The Petitioner is an individual who resides at Stillpond, near Minnetonka Mills, Hennepin County, Minnesota. Petitioner's business address is 2500 Rand Tower, Minneapolis, Hennepin County, Minnesota.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to Petitioner on November 5, 1931.

3. The taxes in controversy are income taxes for the calendar year 1928. Respondent has determined that Petitioner's tax liability is $238,493.11. The tax previously assessed is $193,773.39. The deficiency asserted is $44,719.72. Of the foregoing the deficiency and $64,296.02, as nearly as it may be computed, is in controversy.

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) Respondent erred in determining that the fair market value on January 30, 1922, of the common stock of Minneapolis Gas Light Company, was $111.482 per share, in that the fair market value per share of said stock was, on said date, $610.00.

(b) Respondent erred in determining that the fair market value on January 28, 1927, of the common stock of Minneapolis Gas Light Company was $99.44 per share, in that the fair market value per share of said stock was, on said date, $267.00.

(c) Respondent erred in determining that 962-2/3 shares of the common stock of Minneapolis Gas Light Company, sold by Petitioner on or about May 28, 1928, had not been held by Petitioner for more than two years, in that said shares had been continuously held by Petitioner since October 31, 1925, until sold.

(d) Respondent erred in determining that 248 shares of the common stock of Pillsbury Flour Mills, Inc., 33 shares of the Preferred stock of Archer Daniels Midland Co., 8 shares of the common stock of Archer Daniels Midland Co. and 7 shares of the Preferred stock of Vassar Swiss Underwear Company, sold by Petitioner during the calendar year 1928, had not been held by Petitioner for more than two years, in that said shares had been continuously held by Petitioner since October 31, 1925, until sold.

[fol. 5] (e) Respondent erred with respect to 248 shares of the common stock of Pillsbury Flour Mills Company in determining that the cost thereof to Petitioner was $4,383.41 and the sale price thereof was $8,804, in that the cost of said stock to Petitioner was $4,373.47 and the sale price thereof was $8,756.88.

5. The facts upon which Petitioner relies as the basis of this proceeding are as follows:

(a) On May 28, 1928, petitioner was the owner of 3281 shares of the common stock of Minneapolis Gas Light Company, a corporation engaged in the business of manufacturing and selling gas in the City of Minneapolis, Hennepin County, Minnesota. On said date petitioner sold said 3281 shares and received therefor $1,497,107.50. Said shares were acquired by Petitioner at the time and in the manner hereinafter alleged and petitioner's basis therein at May 28, 1928, was as follows:

(b) 700 shares of said stock were acquired by Petitioner by inheritance from R. R. Rand, Sr., who died intestate on April 15, 1921, and whose estate, including said 700 shares, was distributed to his heirs, pursuant to the formal decree of distribution of the Probate Court in and for Hennepin County, Minnesota, on January 30, 1922. The fair market value on January 30th, 1922, of shares of the common stock of Minneapolis Gas Light Company was $610.00.

(c) 1225 shares of said stock were acquired by Petitioner on April 29, 1925, from said Minneapolis Gas Light Company as a stock dividend in respect of the 700 shares next hereinbefore referred to.

(d) 962-2/3 shares of said stock were acquired by Petitioner by inheritance from Alonzo T. Rand, who died intestate on October 31, 1925, and whose estate, including said 962-2/3 shares was distributed to his heirs pursuant to the formal decree of distribution of the Probate Court in and for Hennepin County, Minnesota, on January 28, 1927. The fair market value on January 28, 1927, of shares of the common stock of said Minneapolis Gas Light Company, was $267.00 per share.

(e) 200 shares of said stock were acquired by Petitioner on January 14, 1926, by purchase and Petitioner paid therefor $55.00 per share.

(f) 193⅓ shares of said stock were acquired by Petitioner on October 21, 1927, by purchase and the Petitioner paid therefor $85.00 per share.

[fol. 6] (g) On May 28, 1928, Petitioner was the owner of 248 shares of the common stock of Pillsbury Flour Mills, Inc., a corporation, 33 shares of the preferred stock of Archer Daniels Midland Co., a corporation, 8 shares of the common stock of Archer Daniels Midland Co., a corporation, and 7 shares of the preferred stock of Vassar Swiss Underwear Company, a corporation. Said shares were acquired by Petitioner by inheritance from Alonzo T. Rand, who died intestate on October 31, 1925, and whose estate, including said 962-2/3 shares, was distributed to his heirs pursuant to the formal decree of distribution of the Probate Court in and for Henepin County, Minnesota, on January 28, 1927. Petitioner sold said shares in the calendar year 1928. The amounts received therefor and the cost or basis to Petitioner thereof were as follows:

	Amount Received	Cost
33 shares Archer Daniels Midland Co. Preferred	$3,732.93	$3,498.00
8 shares Archer Daniels Midland Co. Common	648.66	325.00
7 shares Vassar Swiss Underwear Company Preferred	784.00	700.00
248 Pillsbury Flour Mills, Inc. common	8,756.88	4,383.41

Wherefore Petitioner prays that this Board may hear the proceeding and determine:

(a) That the fair market value on January 30, 1922, per share of the common stock of Minneapolis Gas Light Company was $610.00.

(b) That the fair market value on January 28, 1927, per share of the common stock of Minneapolis Gas Light Company was $267.00.

(c) That petitioner held 962-2/3 shares of the common stock of Minneapolis Gas Light Company, 248 shares of the common stock of Pillsbury Flour Mills, Inc., 33 shares of the preferred stock of Archer Daniels Midland Co., 8 shares of the common stock of Archer Daniels Midland Co. and 7 shares of the preferred stock of Vassar Swiss Underwear Company, acquired by him by inheritance from Alonzo T. Rand, continuously from October 31, 1925.

(d) That the amount received by Petitioner for 248 shares of the common stock of Pillsbury Flour Mills, Inc. was $8,756.88.

[fol. 7] (e) That there is an overpayment of Petitioner's tax liability for the calendar year 1928.

(f) That there is no deficiency in Petitioner's tax liability for said year.

Howe P. Cochran, Munsey Building, Washington, D. C.; J. B. Faegre, 1260 Northwestern Bank Bldg., Minneapolis, Minn., and Leland W. Scott, 1310 First National-Soo Line Bldg., Minneapolis, Minn., Counsel for Petitioner.

Duly sworn to by R. R. Rand, Jr. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

NP-2-28

IT:AR:D-1
HBA-60D

Mailed Nov. 5, 1931.

Mr. R. R. Rand, Jr.,
2500 Rand Tower,
Minneapolis, Minnesota.

SIR:

You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of $44,719.72, as shown in the statement attached.

[fol. 8] In accordance with Section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing

of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner, by J. C. Wilmer, Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870
mm-4

Statement

IT:AR:D-1
HBA-60D

In re: Mr. R. R. Rand, Jr., 2500 Rand Tower, Minneapolis, Minnesota.

Tax Liability

Year.	Tax Liability.	Tax Assessed.	Deficiency.
1928	$238,493.11	$193,773.39	$44,719.72

Reference is made to the report of the internal revenue agent in charge at Saint Paul, Minnesota, to your protest submitted under date of July 18, 1930, and to the conference held in this office on October 8, 1931.

Your contention that the value as of January 28, 1927, of common stock of the Minneapolis Gas Light Company was $124.79 instead of $99.44, the amount recommended as the [fol. 9] result of the conference held in the office of the internal revenue agent in charge has been denied. The value recommended has been determined by direct comparison with common stocks of light companies which were listed on the New York Stock Exchange or curb and determining therefrom the ratio between selling prices and earnings and applying this same ratio to the earnings per share of the stock in question. This method has been sustained by this office.

Your contention that profit from the sale of 962 2/3 shares of stock of the Minneapolis Gas Light Company acquired from the Estate of A. T. Rand should be considered as capital gain has also been denied.

Your attention is called to section 101 (c) (8) (B) of the Revenue Act of 1928, wherein it is provided that in determining the period for which the taxpayer has held property there shall be included the period for which such property was held by any other person if under the provisions of section 113 such property has for the purpose of determining gain or loss from a sale or exchange the same basis in whole or in part in the taxpayer's hands as it would have in the hands of such other person.

Mr. R. R. Rand, Jr. Statement.

1928

From the above it is apparent that the period during which the taxpayer has held property for capital gain purposes is directly related to the basis to be used for gain or loss purposes.

Since the stock in question was acquired by intestacy and the stock was distributed to you on January 28, 1927, the basis for gain or loss purposes is the value as of the date distributed in accordance with section 113 (a) (5) of the Revenue Act of 1928.

It is therefore held that the property was not held by you two years prior to sale and the profit represents ordinary income.

[fol. 10] Ordinary net income shown on return		$215,933.13
Add:		
1. Increase in salary		833.36
2. Increase in interest received		581.00
3. Increase in profit from sales		348,116.84
Total		$565,464.33
Deduct:		
4. Increase in interest paid	$581.00	
5. Losses transferred from capital gain and loss	12,700.00	
		13,281.00
Ordinary net income adjusted		$552,183.33
Capital net gain shown on return		$1,211,357.80
Deduct:		
6. Decrease in profit		314,640.19
Capital net gain adjusted		$896,717.61

1928

Computation of Tax

Ordinary net income		$552,183.33
Less:		
Dividends	$54,508.63	
Personal exemption	5,100.00	
		59,608.63
Income subject to normal tax		$492,574.70
Normal tax at 1½% on $ 4,000.00		60.00
Normal tax at 3% on $ 4,000.00		120.00
Normal tax at 5% on $484,574.70		24,228.74
Surtax on $552,183.33		102,096.67
Tax at 12½% on $896,717.61		112,089.70
Total tax		$238,595.11
Less:		
Earned income credit	$19.70	
Income tax paid at source	82.30	
		102.00
Tax Liability		$238,493.11
Tax assessed		193,773.39
Deficiency		$44,719.72

Explanation of Adjustments

1. Net salary was understated in the return by $833.36, the correct amount being $9,727.46 instead of $8,894.10 as reported.

2. This adjustment represents payment of accrued interest on tax-free covenant bonds erroneously offset against tax-free covenant bond interest received.

[fol. 11] 3. Profit of $97,537.39 reported from the sale of securities held less than two years prior to sale has been increased by the following:

Number of shares	Corporation	Sale price	Cost	Profit
248	Pillsbury	$8,804.00	$4,383.41	$4,420.59
962 2/3	Minneapolis Gas Light Company	439,261.05	95,727.57	343,533.48
	Total			$347,954.07
	Decrease in cost of 193 1/3 shares Minneapolis Gas Light Company stock (at $85.00—$16,433.33 instead of $16,596.10)			162.77
	Total increase			$348,116.84

4. See explanation of adjustment 2 above.

5. Since this loss was sustained through worthlessness of stocks it constitutes an ordinary rather than a capital loss.

6. The adjustments in capital net gain are as follows:

Profit reported on 248 shares common stock of the Pillsbury Flour Mills transferred to ordinary gain	$6,738.91
Decrease in profit from sale of 700 shares Minneapolis Gas Light Company stock (basis $111.482 per share)	1,471.40
Profit reported from sale of 962 2/3 shares Minneapolis Gas Light Company stock transferred to ordinary gain	319,129.88
Total decrease	$327,340.19
Total decrease (brought forward)	$327,340.19
Add:	
Loss on worthless stock eliminated from capital gain	12,700.00
Net decrease	$314,640.19

A consent which will expire December 31, 1931, except as extended by the provisions of section 277 of the Revenue Act of 1928 is on file for the year 1928.

Copies of this communication have been furnished your representatives in accordance with the authority conferred upon them in the power of attorney executed by you and on file with the Bureau.

[fol. 12] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED ANSWER OF COMMISSIONER OF INTERNAL REVENUE—Filed June 6, 1932

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel for the Bureau of Internal Revenue and for his amended answer to the petition of the above-named taxpayer admits and denies as follows, to-wit:

1, 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1928; that respondent determined petitioner's tax liability to be $238,493.11; that $193,773.39 has been assessed and that the deficiency asserted is $44,719.72, as alleged in paragraph 3 of the petition. Denies the remaining allegations contained in paragraph 3.

4. Denies the allegations of error contained in paragraphs 4(a) to (e), inclusive, of the petition.

5. Denies the allegations contained in paragraphs 5(a) to (g), inclusive, of the petition.

Denies generally and specifically each and every allegation set forth in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: Mason B. Leming, John R. Gaskins, Special Attorneys, Bureau of Internal Revenue.

[fol. 13] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 53902, 57365, 60782, 60784 and 60785

ELIZABETH RAND STONE, Formerly Elizabeth Rand Anderson, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

SUSANNE J. RAND, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

RUFUS R. RAND, JR., as Executor of the Estate of Mary R. Birch, Deceased, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

R. R. RAND, JR., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

KATE A. OGLE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Hayner N. Larson, Esq., for the petitioners.
James K. Polk, Jr., Esq., for the respondent.

OPINION

LANSDON:

The respondent has determined deficiencies for the year 1928 in the respective amounts of $26,130.38, $6,100.76, $23,878.36, $44,719.72 and $103,523.72. The only issue sub-

mitted for our decision is whether certain profits realized from the sale of stocks in 1928 are taxable as capital gains or as ordinary income. The parties have filed stipulations as follows:

The number of shares of the common capital stock of the Minneapolis Gas Light Company outstanding from before 1905 to April 30, 1925, was 16,000 of a par value of $50 each; that on March 3, 1925, said company declared and on April 30, 1925, issued a stock dividend of 175% and that at all times thereafter the number of shares of common capital stock of said company outstanding was 44,000 shares of a par value of $50 each; that there was distributed to petitioner, Elizabeth Rand Anderson Stone, on May 1, 1919, 450 shares of said stock from the Estate of L. S. Rand, who died intestate April 16, 1918, and that said 450 shares were, together with other shares, sold on May 28, 1928, as hereinafter set forth; that on January [fol. 14] 30, 1922, there were distributed to petitioners, Rufus R. Rand, Jr., Mary Rand Birch, since deceased, and Susanne J. Rand, 700 shares each of said stock pursuant to a decree of distribution from the Estate of Rufus R. Rand, Sr., who died intestate, which said shares of stock were sold by said respective petitioners, together with other shares then owned by them, on May 28, 1928, as hereinafter set forth; and that on January 28, 1927, there were distributed to petitioner Kate A. Ogle, 1,925⅓ shares and to petitioners, Elizabeth Rand Anderson Stone, Rufus R. Rand, Jr., and Mary Rand Birch, since deceased, 962⅔ shares each of said stock pursuant to a decree of distribution from the Estate of Alonza T. Rand, who died intestate October 31, 1925, all of which said shares were sold on May 28, 1928, as hereinafter set forth.

That the 450 shares of the said stock of the Minneapolis Gas Light Company, distributed to Elizabeth Rand Anderson Stone on May 1, 1919, had a fair market value on that date of $139.84 per share; that the 700 shares of the said capital stock of the Minneapolis Gas Light Company distributed to each of the petitioners, Rufus R. Rand, Jr., Mary Rand Birch and Susanne J. Rand, on January 30, 1922, had a fair market value on that date of $175 per share, and that the 962⅔ shares of the said Minneapolis Gas Light Company distributed to each of the petitioners, Elizabeth Rand Anderson Stone, Rufus R. Rand, Jr., and

Mary Rand Birch, since deceased, and the 1,925⅓ shares distributed to petitioner, Kate A. Ogle, under date of January 28, 1927, had a fair market value on that date of $176 per share.

That on May 28, 1928, the petitioners sold the shares of common stock of said Minneapolis Gas Light Company acquired as stated in paragraph 2 above, for cash as indicated below:

Name of petitioner	Valuation date	No. of shares	Basis for gain or loss	Cash received	Taxable gain
Elizabeth Rand Anderson Stone	5- 1-1919	450	$62,928.00	$339,141.24	$276,213.24
	1-28-1927	962-2/3	169,419.33	263,822.20	94,402.87
Susanne J. Rand	1-30-1922	700	122,500.00	527,553.50	405,053.50
Mary Rand Birch	1-30-1922	700	122,500.00	527,553.18	405,053.18
	1-28-1927	962-2/3	169,419.33	263,822.26	94,402.93
Rufus R. Rand, Jr.	1-30-1922	700	122,500.00	878,369.99	755,869.99
	1-28-1927	962-2/3	169,419.33	439,261.05	269,841.72
Kate A. Ogle	1-28-1927	1,925-1/3	338,838.67	527,644.84	188,806.17

It is further stipulated and agreed that if the gain derived from the sale of the Minneapolis Gas Light Company stock distributed to said petitioners on January 28, [fol. 15] 1927, is not capital gain and is not taxable at the rate provided in section 101 of the Revenue Act of 1928 but at the normal and surtax rates provided for by said Act, the Board may enter its final orders of deficiency or overpayment as follows:

Name of petitioner	Deficiency	Overpayment
Elizabeth Rand Anderson Stone	$4,881.74	[11.]
Suzanne J. Rand	.....	$5,711.74
Mary Rand Birch	.....	104.91
Rufus R. Rand, Jr.	20,736.45	.....
Kate A. Ogle	30,367.12	.....

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel of record, that the fair market value on March 1, 1913, of the stock of the Minneapolis Gas Light Company owned by this petitioner was $353.10 per share and that the said value on March 1, 1913, of the 1,900 shares of the Minneapolis Gas Light Company stock owned by the petitioner was $670,890.

It is further stipulated and agreed that the Board may find the March 1, 1913 value of the Minneapolis Gas Light Company stock so held by the petitioner to be in the amount of $670,890 as aforesaid, and that such finding of

value shall be binding upon the parties hereto for all purposes in this proceeding.

The Estate of Alonzo T. Rand, who died intestate October 31, 1925, had personal property of a market value of at least $1,840,948, and real estate of a market value of at least $263,800, a total of $2,104,748. Included in the personal property were cash of $223,814.73 and United States Government obligations of a market value of $145,829.60, a total of $369,644.33. During administration and prior to January 28, 1927, the estate had cash receipts of $161,995.97. Debts and obligations of the estate, constituting all debts and obligations paid or payable before and after January 28, 1927, were as follows:

1. Expenses of administration	$50,049.12
2. Funeral expenses	785.00
3. Taxes other than estate taxes	28,172.26
4. Claims of creditors	6,374.01
5. State and Federal estate taxes	178,451.90
A total of	$263,832.29

In his audit of the returns of the several petitioners for the taxable year, the respondent made many adjustments and determined the deficiencies now in controversy. The [fol. 16] petitioners allege numerous errors in such determinations but the stipulations, with one exception, settle all the pleaded issues. The parties now agree that the only question submitted to the Board is whether the profits realized from the sale of the stock of the Minneapolis Gas Light Company on May 28, 1928, by Martha A. Ogle, Elizabeth Rand Anderson Stone, Rufus R. Rand, Jr., and Mary Rand Birch should be taxed as capital net gains or as ordinary income.

The stock in question was inherited by the petitioners from Alonza T. Rand, who died intestate on October 31, 1925. It was distributed to the several petitioners on January 28, 1927 and sold by them on May 28, 1928. The parties now agree on the valuation of such stock as of the date of distribution, but differ as to the time it was held after acquisition. The respondent has based his deficiencies on the theory that such stock was held by the petitioners from the date of distribution to the date of sale, which was less than two years. The petitioners contend that they acquired the stock on the date of the death of

Alonzo T. Rand and held it continuously until the date of sale or for a period of more than two years. In several recent decisions the Board, on similar facts has decided this question adversely to the contentions of the petitioners. Nancy K. McFeely, 29 B. T. A. 998; Isabel K. Dibblee, 29 B. T. A. 1070. Upon the authority of such decisions, the determinations of the respondent are affirmed.

The parties have stipulated that if we hold that the profits in question should be taxed as ordinary income there are certain specified deficiencies and overassessments of the several petitioners for the year 1928.

Enter:
Entered: May 24, 1934.

Decisions will be entered in conformity with the stipulation.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 53902, 57365, 60782, 60784, 60785

[Title omitted]

ORDER AMENDING OPINION

[fol. 47] For good cause, it is

Ordered: That the Memorandum Opinion of the Board in the above-entitled proceeding entered May 24, 1934, be, and the same is hereby, amended as follows:

(1) By inserting, in brackets, the name "Kate A. Ogle", immediately after the word "petitioner" in the next to the last paragraph on page three; and

(2) By substituting the word "Kate" for the word "Martha" in the seventh line of the first full paragraph on page four.

W. C. Lansdon, Member. (Seal U. S. Board of Tax Appeals, 1924.)

Dated June 1, 1934.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 60784

R. R. RAND, JR., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF REDETERMINATION—May 28, 1934

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered May 24, 1934, it is

Ordered and Decided: That there is a deficiency of $20,736.45 for the year 1926.

Enter:

Entered May 28, 1934.

W. C. Lansdon, Member. (Seal of U. S. Board of Tax Appeals.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

MOTION OF PETITIONERS TO VACATE OPINION AND DECISION—Filed July 23, 1934

[fol. 18] Docket Nos. 53902, 57365, 60782 and 60785

Come now the Petitioners in the above entitled causes, save and except Susanne J. Rand, by the undersigned, their counsel of record, and upon the pleadings, stipulation, the official report of proceedings before the United States Board of Tax Appeals at St. Paul, Minnesota, on March 23, 1934, the opinion entered herein May 24, 1934, and upon all the files and records herein move this Honorable Board to withdraw said opinion and vacate the decision entered herein on May 28, 1934, in the above entitled causes, save and except Docket No. 57365, and to reconsider the sole issue submitted for decision and rehear Petitioners thereon.

Petitioners assign the following as their reasons why this motion should be granted;

1. The decision is erroneous in that it is based on the doctrine that property, to qualify as "capital assets", must have been under the exclusive dominion and control of the taxpayer himself for over two (2) years. This doctrine was first formulated in Johnson vs. Commissioner, (C. C. A. 3) 552 F. (2d) 726, and Schoenberg vs. Burnet, (App. D. C.) 55 F. (ed) 543, relied upon by the Board in McFeely vs. Commissioner, 29 B. T. A. 998, and Dibblee vs. Commissioner, 29 B. T. A. 1070, but repudiated by the Supreme Court of the United States in Helvering vs. New York Trust Company, — U. S. —, (Opinion filed May 24, 1934, see 1 Prentice Hall Federal Tax Service 1934, Par. 1302, 343 C. C. H. 9314).

2. The decision is erroneous in that it is based on the doctrine that Section 113 (a) (5) Revenue Act of 1928 [fol. 19] amends Section 101, the capital gains section, of said Act, a result neither expressed nor intended by Congress.

3. The doctrine relied upon in the McFeely and Dibblee cases, supra, defeats the purpose of the capital gains section of the law plainly expressed to encourage the sale or exchange of property by providing a rate of tax on gain realized therefrom less onerous than the high normal and surtax rates.

4. The doctrine relied upon in the McFeely and Dibblee cases, supra, is erroneous because it fails to give effect to Sections 168 and 701 (b) of the Revenue Act of 1928, clearly related to the capital gains section whereby the Congress evidences an intention to provide that the period of holding of property acquired by inheritance shall commence from the date of decedent's death.

5. In the case of inherited property, the period of holding, required by the capital gains section of all taxpayers, is the period commencing at decedent's death, and an heir is not required to exclude therefrom the time between decedent's death and distribution.

Issue Presented

Were shares of stock, inherited from an intestate who died domiciled in Minnesota October 31, 1925, which were

distributed January 28, 1927, pursuant to a decree of distribution, "held" more than two years by the heirs on May 28, 1928, when they were sold, within the meaning of Section 101 (c) (8), Revenue Act of 1928?

Argument

(1) The doctrine that a taxpayer's tenure of property under the capital gains section commences as of the time when the taxpayer himself acquires dominion and control over such property has been completely repudiated by the Supreme Court of the United States in Helvering vs. New York Trust Company, supra. In this case it is held that the time during which a donor of personal property owned and held that property may be added to the time the trustee of an express trust for the benefit of the donor's son and the son, i. e., beneficiary and a donee, had title and control of property in order to determine the beneficiary's or donee's rights to the capital gain rate on the gain realized from the sale of the donated property. Thus it clearly appears that the periods of holding of two different persons, each having beneficial title for his own use, may be [fol. 20] united for the purpose of making up the more than two year period required by the capital gains section to constitute property "capital assets". Neither the trustee, beneficiary nor donee can be said to have dominion or control over property while it is still owned and held by a donor. It follows therefore that the Board's doctrine is unsound and erroneous and that, the decision of the Board in Petitioners' cases being based on that doctrine, Petitioners are in fairness entitled to a reconsideration of the sole issue presented.

2. Petitioners understand that the Board also supports its conclusion and its decisions in the McFeely and Dibblee cases, supra, on the ground that Section 113 (a) (5) of the Revenue Act of 1928 fixes the basis for determining gain or loss on the sale of property acquired by intestacy (the way Petitioners acquired the property involved) as the value thereof at the time of distribution (January 28, 1927, in Petitioners' case). Thus the Board concludes, erroneously, we submit, and without support from the language used in the statute, the published reasons of Congress for enacting Section 113 (a) (5), or the applicable law and rules, that this section is an amendment of or qualifies the

definition of "capital assets" in the capital gains section of the law. But that definition, originally adopted by Congress in the enactment of the capital gains section of the Revenue Act of 1921, has been repeatedly re-enacted without material change in the corresponding sections of each succeeding Revenue Act until the enactment of the Revenue Act of 1934. The rules for determining tenure first added by the Revenue Act of 1926 were not new law. Helvering vs. New York Trust Co., supra. Moreover upon the recommendation of the Joint Committee on Internal Revenue Taxation (November 15, 1927) pages 10 and 40, et seq., Congress re-enacted the capital gains section in the Revenue Act of 1928 without change. Two other pertinent sections of the Revenue Act of 1928, which we first discuss, are re-enactments of corresponding sections of the Revenue Acts of 1921, 1924, 1926, and were re-enacted in the Revenue Act of 1932. They are Sections 168 and 701 (b).

Section 168 provides in substance that in the case of an estate or a beneficiary thereof, the proper part of each share of the net income consisting of capital net gain, etc., shall be separately shown on the estate's return and taxed to the beneficiary or the estate as provided in the estate sections of the law but at the capital gains rate. Section [fol. 21] 701 (b) provides in substance that the term "includes" as used in any definition contained in the Act shall not be deemed to exclude other things otherwise within the meaning of the term defined. Thus in the case of personal property passing at death, although the legal title may go over to an executor or administrator, which is sold by the executor or administrator, under Section 168 the heir is entitled to the capital gain rate on that portion of the gain on which he is taxed, provided the property was held for more than two (2) years. And this is true, although the period of administration may not have ended, the sale was effected by the executor or administrator, and the heir did not have exclusive dominion and control over the property at the time of sale. Moreover, under Section 701 (b), which is but statutory recognition of a well known rule of construction, it clearly appears that paragraph (B) of Subsection (c) of the capital gains section of the law is in no sense a limitation upon the definition of capital assets found therein. This is so because, as will hereinafter be more fully shown, personal property passing at death vests in the decedent's heirs as of the date of death of the decedent.

Accordingly such property would, under the law, without Subparagraph (b), supra, being in the law, be within the definition of capital assets if the time which had elapsed between decedent's death and the date of sale was more than two (2) years.

Shortly after the passage of the Revenue Act of 1921, the Bureau of Internal Revenue had occasion to construe the capital gains section of that Act and held that property sold by an heir and acquired by inheritance qualified as capital assets if the date of decedent's death was more than two years before the sale. I. T. 1889, III-1 C. B. 70, (January to June, 1924). The Bureau's reasons were that the interest of a distributee of a decedent's estate attaches as of the date of decedent's death; that while the interest of the distributee is subject to account and distribution, it is an interest analogous to that of the beneficiary of the trust and vests at the date of the death of the testator; that the administrator takes no beneficial interest in the decedent's property; that the Bureau of Internal Revenue had theretofore adopted this doctrine in regulations and rulings; that Section 206 (c) of the Revenue Act of 1921, now Section 168 of the Revenue Act of 1928, reveals that Congress did not intend to require legal title and possession by the use of the terms "acquired and held" in the definition of capital assets; that the express purpose of enact-
[fol. 22] ing a capital gains section, i. e., to provide relief for taxpayers, negatives the idea that Congress attempted to distinguish between legal and beneficial interests; that the Bureau of Internal Revenue early adopted the view, both in regulations and rulings, that the capital gains section did not require actual possession of assets which qualified as capital assets in all cases.

In so far as Petitioners have been able to find, the construction aforesaid was not abandoned by the Bureau until the decisions of the Board in the McFeely and Dibblee cases. The Bureau's reasons for its construction of the definition contained in the capital gains section of the Revenue Act of 1921, re-enacted without material change in the Revenue Acts of 1924, 1926 and 1928 and 1932, are supported by the Supreme Court of the United States in Brewster vs. Gage (1930), 280 U. S. 327, 8 A. F. T. R. 10263, wherein the court says:

"The decree of distribution confers [now] new right; it merely identifies the property remaining, evidences right

of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. Foster vs. Fifield, 20 Pic., 67, 70; Wager vs. Wager, 89 N. Y. 161, 166; Thompson vs. Thomas, 30 Miss. 152, 158.

"Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property."

In Minnesota an administrator, while taking legal title to personalty, takes for a special purpose only and really as a Trustee. The heirs' interests vest as of the date of decedent's death and during administration their interest is similar to the interests of beneficiaries of a trust. Mason's Minnesota Statutes for 1927, Sections 8726, 8786, 8880, Vail vs. Anderson, 61 Minn. 552, 65 N. W. 47, Granger vs. Harriman, 89 Minn. 303, 94 N. W. 869.

Section 113 (a) (c) of the Revenue Act of 1928 does not amend or modify the capital gains section of the law. To give it such effect is to ignore completely the effect of the reenactment of Sections 168 and 701 (b), supra, and the history of the times which occasioned the change in the basis section of the law.

[fol. 23] If the history of the times be resorted to, for the purpose of determining the intention of Congress in adopting Section 113 (a) (5) of the Revenue Act of 1928, it will disclose no expression or decision, at least in so far as petitioners have been able to find, indicating that Congress intended, by the adoption of that section, to effect the capital gains section of the law. On the contrary, there is direct evidence that Congress intended to and did re-enact capital gains sections in the Revenue Act of 1928 without change. Examination of report No. 960 of the Committee on Finance of the Senate on the Internal Revenue Bill of 1928 and report No. 1882 of the Conference Committee of both Houses of Congress on said Bill, and particularly page 26 of the first report, will disclose that McKinney vs. United States, (1926) —— Ct. Cls. ——, 5 A. F. T. R. 6041, influenced Congress to change the statutory rule which had theretofore obtained respecting basis of property acquired

by general bequest or through intestacy. Thus the report first referred to states in part:

"The decision of the Court of Claims in McKinney vs. United States has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate * * *. Accordingly the Committee has revised Section 113 (a) (5) and certain related Sections."

Cf. Report No. 704, Ways and Means Committee, Revenue Act of 1934, Page 28; Report of the Senate Finance Committee, Revenue Act of 1934, 343 C. C. H. 6813, 6834.

Petitioners have been unable to find in the reports referred to any statement that the capital gains section was included in the reference to "certain related sections." The court that decided the McKinney case determined that under Sections 202 and 213 of the Revenue Act of 1918, the measure of gain realized by an executor upon the sale of property which passed to him from the decedent was the difference between the cost to the decedent and the sale price. The court obviously was influenced by the fact that if the executor's gain was measured by the difference between value at the date of decedent's death and the sale price, a taxable gain would result when in fact there had been an actual loss, since the decedent's cost exceeded the sale price. Bankers Trust Company vs. Bowers, 23 F. (2) 941, Nichols vs. United States, (1927) 65 Ct. Cl. 241, and Straight vs. Commissioner, (1927) 7 B. T. A. 177, to the effect that an individual and his estate after his death are separate and distinct taxable entities and must be regarded as such in determining the income of the estate during the [fol. 24] period of administration, as distinguished from the individual's income during his lifetime, are opposed in principle to the conclusion reached by the court in the McKinney case. The Bureau of Internal Revenue adopted the rule of the McKinney case on April 6, 1927, reversing the position it had long adhered to respecting basis to an executor for gain or loss purposes and on that date promulgated T. D. 4010 (C. B. VI-1 249) amending Article 343 of Regulations 62; T. D. 4011 (C. B VI-1 77) amending Article 343 of Regulations 65 and 69, and T. D. 4012 (C. B. VI-1 248) amending Article 343 of Regulations 45. On July 7, 1928, however, it again reversed itself and reverted

to its original position that value at decedent's death was the proper basis to an executor for gain or loss. T. D. 4177, (C. B. VII-2 134). The report of the Joint Committee on Internal Revenue Taxation, on November 15, 1927, notes the confusion caused by the McKinney case in respect to the proper basis for gain or loss on sales by an executor and a beneficiary, and recommended to Congress that the basic date be the date of death of the decedent. See pages 17 and 74.

While, therefore, the basis for gain or loss purposes, in the case of property acquired by intestacy, etc., became value at date of distribution for the first time, by the enactment of Section 113 (a) (5) Revenue Act 1928, it nowhere appears that Congress had aught in mind than to change the wording of the section of the law relating to basis in order to avoid the doubt cast by the court that decided the McKinney case upon the meaning of the words "date of acquisition" found in corresponding sections of prior laws. It certainly does not appear that Congress intended thereby to affect the capital gains section. And it is clear from the reenactment of Section 168 that Congress thought an heir "held" from decedent's death. If this be not so and the Board's doctrine is sound, the rather absurd results are reached that gain from the sale of an intestate's personal estate by the administrator, who has held for over two years, which is distributable to the heir is taxable, because of Sections 168 and 101, to the heir at the capital gain rate while the same gain realized directly by the heir upon sale by him after distribution but within two years of the date of distribution is subject to normal and surtaxes, although in either case the property sold is the same, the holder of the beneficial interest by virtue of death is the same, in respect of the purpose of the capital gains section no change has resulted by distribution, and the property is the kind which Congress sought to have sold free of the high normal tax and surtax. This encourages [fol. 25] prolonged administration, justifies distrust of Bureau construction of the law and contempt for the judicial process which evolves such an anomaly.

We turn to a consideration of the proper construction of the capital gains section.

3. The purpose behind the enactment and retention of the capital gains section was unquestionably to encourage

the sale or exchange of property and relieve taxpayers of the onerous normal and surtaxes on gains realized. Hence the twelve and one-half per cent rate was provided. When Congress defined "capital assets" it did not have in mind only such property as was under the exclusive dominion and control of the taxpayers. "Held" is synonymous with "owned" and is broad enough to include property acquired by gift and to relate tenure back to the date of the donor's acquisition, broad enough to include property acquired in a tax free exchange and property the value of which is not subject to tax in the year received. Helvering vs. New York Trust Co., supra. It was thought by the Bureau to be broad enough to include property acquired by inheritance, the tenure to commence at decedent's death. I. T. 1889, supra. When the rules for determining tenure were added to the capital gains section they were not drawn so as to constitute limitations on the definition of "capital assets". No thought was expressed by the legislative committees that those rules applied to property acquired by inheritance.

The report of the Senate Committee on Finance on the Internal Revenue Bill of 1926 at page 18 contains the following:

"* * * Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact the question frequently arises as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The House bill incorporates in the law the present regulation of the Treasury and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gain and loss under this section. The same question arises in the case of property received by gift after December 31, 1920. The House bill provides that the period for which the property was held by the donor shall be added to the period for which the property was held [fol. 26] by the donee in determining whether or not the property so received falls within the capital gain or loss section."

It was never supposed that the rule, that property acquired by inheritance vests in the heir as of the date of death (Brewster vs. Gage, supra) was of doubtful validity until the McKinney case, and possibly the decision of the District Court in Brewster vs. Gage, speedily reversed. Certainly the Bureau regarded the rule as sound. I. T. 1889, supra. It has never revoked that ruling to Petitioners' knowledge. Nor was it ever supposed that the period during which an executor or administrator held title was not a period of holding by the heir.

Congress has never seen fit to attempt to tax as income to the heir upon sale all the appreciation in value of property inherited over the cost to the decedent. Until the 1928 Act was passed, the statutory rule for measuring an heir's gain was difference between value at the date of death and sale price. Thereafter and until the 1934 Act, it was the difference between value at date of distribution, in case of property acquired by general bequest or intestacy, and sale price, a change within the powers of Congress and not compelling the conclusion that the capital gains section was affected. Helvering vs. New York Trust Co., supra.

In this situation no sound reason appears for adopting any other construction of the capital gains section than that where property such as petitioners sold is acquired by general bequest or intestacy, it is owned and therefore "held" from decedent's death; that where property is acquired by tax free exchange, it is "held" from the date of acquiring the property exchanged; and that where property is received by gift, the donated property is "held" from the date of donor's acquisition. Any other construction nullifies related sections of the law and the purpose of the capital gains section.

Certainly, since Helvering vs. New York Trust Co., if the period of holding of each of two different persons, each having beneficial title for his own use, may be added, it is permissible to unite periods of beneficial and legal title held by one and the same person or held by the taxpayer and his mere representative.

Conclusion

Accordingly, it is respectfully submitted that the opinion and decision of this Honorable Board in the above entitled cases should be set aside and the sole issue submitted to

[fol. 27] this Honorable Board reconsidered and decided in Petitioners' favor.

Leland W. Scott, Hayner N. Larson. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, 1300 First National-Soo Line Building, Minneapolis, Minnesota; Cobb, Hoke, Benson, Krause & Faegre, 1260 Northwestern Bank Building, Minneapolis, Minnesota.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Dockets Nos. 53902, 57365, 60782, 60784, 60785

[Title omitted]

ORDER, AUGUST 25, 1934, VACATING ORDER OF REDETERMINATION OF MAY 28, 1934

On May 24, 1934, the Board entered its memorandum opinion in these proceedings and on May 28, 1934, entered its decisions in accordance with said memorandum opinion.

On July 23, 1934, petitioners filed motion to vacate the decisions of the Board and asked for reconsideration. This motion was referred to Division 8 (Turner) for consideration. Said Division Member is now out of Washington and has not the time to act upon said motion prior to the expiration of the time for appeal to the United States Circuit Court of Appeals by petitioners. Wherefore, in order to give said Division Member time and opportunity to consider and act upon said motion for reconsideration, the decisions heretofore entered in these proceedings on May 28, 1934, are vacated and set aside.

(Signed) Eugene Black, Member. (Seal of U. S. Board of Tax Appeals.)

Dated: Washington, D. C., August 25, 1934.

[fol. 28] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 60784

R. R. RAND, JR., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF REDETERMINATION, SEPTEMBER 13, 1934

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered May 24, 1934, it is

Ordered and Decided: That there is a deficiency of $20,736.45 for the year 1928.

Bolon B. Turner, Member. (Seal U. S. Board of Tax Appeals, 1924.)

Entered: Sep. 13, 1934.

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Board of Tax Appeals Docket No. 60784

[Title omitted]

PETITION OF RUFUS R. RAND, JR., FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS—Filed October 26, 1934

To The Honorable, The Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

The Petitioner, in support of this, his petition, filed pursuant to the provisions of Section 1001 of the Act of Congress approved February 26, 1926, otherwise known as the "Revenue Act of 1926", 44 Stat. 109, U. S. C. Title 26, Section 1224, and the Acts amendatory thereof and supplemental thereto, being Section 603 of the Act of Congress approved May 29, 1928, otherwise known as the "Revenue Act of 1928", 45 Stat. 873, and Section 1101 (a) of the Act of Congress approved June 6, 1932, otherwise known as the "Revenue Act of 1932", 47 Stat. 286, for the review of the decision of the United States Board of Tax Appeals, entered on May 28, 1934, approving a deficiency in income taxes of the Petitioner for the calendar year 1928 in the

[fol. 29] amount of Twenty Thousand Seven Hundred Thirty-six and 45/100 Dollars ($20,736.45), respectfully presents to this Honorable Court the following:

I

Statement of the Nature of the Controversy

The above entitled cause involves the legality of the action of the Commissioner of Internal Revenue of the United States in determining that shares of stock, inherited from an intestate who died on October 31, 1925, and distributed to the Petitioner on January 28, 1927, pursuant to a decree of distribution, were not "held" more than two years by said Petitioner by May 28, 1928, when said shares were sold, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, and that they did not come within the meaning of "capital assets" as defined in said Section of said Revenue Act.

II

Declaration of the Court of Review

Petitioner resides at Stillpond, near Minnetonka Mills, Hennepin County, State of Minnesota, and did, for the year 1928, make his return for Federal income tax purposes to the Collector of Internal Revenue in and for the District of Minnesota. Petitioner, being aggrieved by the decision of the United States Board of Tax Appeals, aforesaid, and by the opinion of said Board filed therewith, now seeks a review thereof in accordance with the provisions of the Act of Congress approved February 26, 1926, and the Acts amendatory thereof and supplemental thereto, as aforesaid, by the United States Circuit Court of Appeals for the Eighth Circuit, within which circuit is located the office of the Collector of Internal Revenue of the United States for the District of Minnesota, with whom Petitioner made and filed his return of income.

III

Assignment of Errors

Petitioner, as a basis for review, makes the following Assignment of Errors:

1. The Board erred in holding that stock inherited by Petitioner from an intestate who died October 31, 1925,

which stock was distributed to Petitioner on January 28, 1927, and sold by Petitioner on May 28, 1928, was not property "held" by Petitioner, more than two years and, hence, was not a "capital asset" within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

[fol. 30] 2. The Board erred in that its holding is based on the theory that property, to qualify as "capital assets", within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, must have been under the dominion and control of the taxpayer alone fully and exclusively for over two (2) years.

3. The Board erred in not determining that the period of "holding" of said stock by Petitioner, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, also included the period from the intestate's death to the time of distribution of the property of his estate.

4. The Board erred in that, in so refusing to recognize as part of the time said stock was "held" by Petitioner, within the meaning of said Section 101 (c) (8), the period between the death of the intestate and the distribution to Petitioner, its decision runs counter to the provisions and the spirit of Section 168 of the Revenue Act of 1928, whereby the income of an estate or trust or of a beneficiary of an estate or trust specifically is made subject to the capital gain rate provisions of said Section 101 (a), even though exclusive dominion and control over the property of the estate or trust does not rest in the beneficiary thereof.

5. The Board erred in con-truing together, and thereby confusing, the unrelated Sections 101 (c) (8) and 113 (a) (5) of the Revenue Act of 1928, and in concluding that the period during which property is "held", within the meaning of the former section, defining capital assets, commences only at the basis date, specified by the latter section, for determining gains or losses from the sale or other disposition of property.

6. The Board erred in failing to recognize and give effect to Section 701 (b) of the Revenue Act of 1928 in its relation to Section 101 (c) (8) (B) of said Act, by giving to the word "included" of the latter Section an exclusive interpretation, instead of construing it in a way not exclusive of other things otherwise within the meaning of the word "held".

7. The Board erred in concluding that profits realized from the sale on May 28, 1928 of stock inherited by Petitioner from an intestate, who died October 31, 1925, and distributed to Petitioner on January 28, 1927, was taxable as ordinary income under Sections 11 and 12 of the Revenue Act of 1928 and not as "capital gains" under Section 101 (a) of said Act.

Wherefore, your Petitioner prays that this Honorable Court may review the decision of the United States Board [fol. 31] of Tax Appeals, its findings and opinion, and reverse and set aside the same, and that the Clerk of the United States Board of Tax Appeals be directed to prepare, transmit and deliver to the Clerk of this Honorable Court certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing Petition for Review, and as required by the rules of this Honorable Court and the statutes made and provided.

Leland W. Scott, 1300 First National-Soo Line Building, Minneapolis, Minnesota. Hayner N. Larson, 1260 Northwestern Bank Building, Minneapolis, Minnesota, Attorneys for Petitioner. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, Cobb, Hoke, Benson, Krause & Faegre.

Duly sworn to by Leland W. Scott. Jurat omitted in printing.

BEFORE U. S. BOARD OF TAX APPEALS

NOTICE OF FILING OF PETITION FOR REVIEW AND SERVICE—Filed October 26, 1934

To Robert H. Jackson, Esq., Assistant General Counsel for the Bureau of Internal Revenue, Washington, D. C., Attorney for Respondent:

[fol. 32] You Are Hereby Notified that Rufus R. Rand, Jr., did, on the 26th day of October, 1934, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a Petition for Review by the United States Circuit Court of Appeals for the Eighth Circuit of the decision of the Board heretofore rendered in the above en-

titled case. A copy of the Petition for Review and the Assignment of Errors, as filed, is hereto attached and hereby served upon you.

Dated this 26th day of October, 1934.

Leland W. Scott, 1300 First National-Soo Line Building, Minneapolis, Minnesota; Hayner N. Larson, 1260 Northwestern Bank Building, Minneapolis, Minnesota, Attorneys for Petitioner. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, Cobb, Hoke, Benson, Krause & Faegre.

Personal service of the foregoing Notice, together with a copy of the Petition for Review and Assignment of Errors mentioned therein is hereby acknowledged this 26th day of October, 1934.

Robert H. Jackson, Attorney for Respondent.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 60784

RUFUS R. RAND, JR., Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

Statement of Evidence—Lodged November 24, 1934 and Filed December 4, 1934

The above entitled cause came on for hearing on the 23rd day of March, 1934, before the Honorable William C. Lansdon, then a Member of the United States Board of Tax Appeals, at St. Paul, Minnesota, pursuant to notice of hearing theretofore given. The facts were stipulated and, in so far as pertinent here, are as follows:

[fol. 33] STIPULATION OF FACTS

1

That the number of shares of the common capital stock of the Minneapolis Gas Light Company outstanding from before 1905 to April 30, 1925, was 16,000 of a par value of

$50.00 each; that on March 3, 1925, said company declared and on April 30, 1925, issued a stock dividend of 175% and that at all times thereafter the number of shares of common capital stock of said company outstanding was 44,000 shares of a par value of $50.00 each; * * * that on January 28, 1927, there were distributed to petitioner, * * * Rufus R. Rand, Jr., * * * 962⅔ shares * * * of said stock pursuant to a decree of distribution from the Estate of Alonzo T. Rand, who died intestate October 31, 1925, all of which said shares were sold on May 28, 1928, as hereinafter set forth.

2

* * * That the 962⅔ shares of the said Minneapolis Gas Light Company distributed to * * * the petitioner Rufus R. Rand, Jr., * * * under date of January 28, 1927, had a fair market value on that date of $176.00 per share.

3

That on May 28, 1928, the petitioner sold the shares of common stock of said Minneapolis Gas Light Company acquired as stated in Paragraph 2 above for cash as indicated below:

Name of Petitioner	Valuation date	Number of shares before stock dividend	Basis for gain or loss	Cash received	Taxable gain
* * *	* * *	* * *	* * *	* * *	* * *
Rufus R. Rand, Jr.	January 28, 1927	962 2/3	$169,419.33	$439,261.05	$269,841.72
* * *	* * *	* * *	* * *	* * *	* * *

It was further stipulated and agreed that if the gain derived from the sale of the Minneapolis Gas Light Company stock distributed to the petitioner herein under date of January 28, 1927, constitutes capital gain and is taxable at the rate provided in Section 101 of the Revenue Act of 1928, the Board might enter final order of deficiency or overpayment as follows:

Name of Petitioner	Deficiency	Overpayment
* * *	* * *	* * *
Rufus R. Rand, Jr.	.....	$13,545.09
* * *	* * *	* * *

It was further stipulated and agreed that if the gain derived from the sale of the Minneapolis Gas Light Company [fol. 34] stock distributed to said petitioner on January 28, 1927, is not capital gain and is not taxable at the rate provided in Section 101 of the Revenue Act of 1928 but at the normal and surtax rates provided for by said Act, the Board might enter its final order of deficiency or overpayment as follows:

Name of Petitioner	Deficiency	Overpayment
• • •	• • •	• • •
Rufus R. Rand, Jr.	$20,736.45	.....

4

That the Estate of Alonzo T. Rand, who died intestate October 31, 1925, had personal property of a market value of at least $1,840,948, and real estate of a market value of at least $263,800, a total of $2,104,748. Included in the personal property were cash of $223,814.73 and United States Government obligations of a market value of $145,829.60, a total of $369,644.33. During administration and prior to January 28, 1927, the estate had cash receipts of $161,995.97. Debts and obligations of the estate, constituting all debts and obligations paid or payable before and after January 28, 1927, were as follows:

1. Expenses of administration	$50,049.12
2. Funeral expenses	785.00
3. Taxes other than estate taxes	28,172.26
4. Claims of creditors	6,374.01
5. State and Federal estate taxes	178,451.90
A total of	$263,832.29

MOTION OF PETITIONER FOR JUDGMENT IN HIS FAVOR

Thereupon, on behalf of Petitioner, it was moved that there be judgment in favor of Petitioner and against Respondent on the ground and for the reasons that under any theory of the evidence in this case he is entitled to a judgment of ove payment in the amount of $13,545.09; that he is entitled to have the gain realized from the sale of said shares of stock of Minneapolis Gas Light Company taxed as capital gain under the provisions of Section 101 of the

Revenue Act of 1928 instead of at the normal and surtax rates provided for by said act.

Whereupon said motion was overruled, and an exception thereto noted.

[fol. 35] PRAYER OF PETITIONER FOR APPROVAL OF STATEMENT OF EVIDENCE

The Petitioner, Rufus R. Rand, Jr., tenders and presents the foregoing as a Statement of the evidence in this case and of the proceedings had upon the trial hereof, and prays that the same may be approved by the United States Board of Tax Appeals and made a part of the record in this cause.

Leland W. Scott, 1300 First National-Soo Line Building, Minneapolis, Minnesota, Hayner N. Larson, 1260 Northwestern Bank Building, Minneapolis, Minnesota. Attorneys for Petitioner. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, Cobb, Hoke, Benson, Krause & Faegre.

APPROVAL OF STATEMENT OF EVIDENCE BY COUNSEL FOR RESPONDENT

The foregoing Statement of Evidence is all of the evidence material upon appeal adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel of the Bureau of Internal Revenue, as Attorney for the Respondent.

Robert H. Jackson, Attorney for Respondent.

ORDER APPPOVING STATEMENT OF EVIDENCE

I hereby certify that the foregoing Statement of Evidence has been examined by me and found conformable to the truth and to contain all of the evidence in said cause.

The foregoing Statement of Evidence is hereby approved and signed and ordered to be made of record in the above entitled cause this day of ——, 1934.

—— ——, Member of the United States Board of Tax Appeals.

Approved and Ordered Filed this 4th day of Dec. 1934.

(Sgd.) Bolon B. Turner, Member.

[fol. 36] BEFORE U. S. BOARD OF TAX APPEALS

PRÆCIPE FOR TRANSCRIPT—Filed December 17, 1934

To the Clerk of the United States Board of Tax Appeals:

You are requested by the Petitioner in the above entitled cause to make a transcript of record therein to be filed in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to review taken in said cause, and to include in such transcript of record copies, duly certified as correct, of the following documents:

1. The docket entries of proceedings before the Board in the above entitled cause.

2. Pleadings before the Board in the above entitled cause:

(a) Petition.

(b) Answer.

3. The Memorandum Opinion of the Board promulgated May 24, 1934.

4. The decision in the above entitled cause entered May 28, 1934.

5. Motion to vacate decision in the above entitled cause.

6. Order of the Board entered August 25, 1934, vacating the decision of May 28, 1934.

7. The final decision of the Board in the above entitled cause entered September 13, 1934.

8. The Petition for Review of the above entitled cause, with Notice of filing and proof of service thereof.

9. The Statement of Evidence in the above entitled cause, as approved and filed.

10. This Præcipe.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

Leland W. Scott, 1300 First National-Soo Line Bldg., Minneapolis, Minnesota.

[fol. 37] Hayner N. Larson, 1260 Northwestern Bank Bldg., Minneapolis, Minnesota. Attorneys for Petitioner. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, Cobb, Hoke, Benson, Krause & Faegre.

Received a copy of the foregoing præcipe which is hereby agreed to this 17th day of December, 1934.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, Counsel for Respondent.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 38 & 39] Appearances of counsel omitted in printing.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS

STIPULATION THAT DECEDENT, ALONZO T. RAND, WAS AT DATE OF DEATH A CITIZEN AND RESIDENT OF STATE OF MINNESOTA—Filed April 2, 1935

It is stipulated and agreed that the decedent, Alonzo T. Rand, was at the date of his death a citizen and resident of the State of Minnesota.

Leland Scott, J. B. Faegre, Hayner N. Larson, Attorneys for Petitioner; Frank J. Wideman, Assistant Attorney General, Attorney for Respondent.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—May 15, 1935

This cause having been called for hearing in its regular order, the same was argued by Mr. Hayner N. Larson for petitioner and by Mr. Frank J. Wideman, Assistant Attorney General, for respondent.

Thereupon, this cause was submitted to the Court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

[fol. 42] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1935

No. 10,224

Rufus R. Rand, Jr., Petitioner,

vs.

Guy T. Helvering, Commissioner of Internal Revenue, Respondent

On Petition to Review Decision of United States Board of Tax Appeals

Mr. Hayner N. Larson (Mr. Robert Driscoll, Mr. J. B. Faegre, Mr. Leland W. Scott, Mr. Harry Blackmun, Messrs. Junell, Driscoll, Fletcher, Dorsey & Barker and Messrs. Cobb, Hoke, Benson, Krause & Faegre were with him on the brief), for petitioner.

Mr. Frank J. Wideman, Assistant Attorney General (Mr. Sewall Key, Special Assistant to the Attorney General, and Mr. John MacC. Hudson, Special Assistant to the Attorney General, were with him on the brief), for respondent.

Before Stone, Woodrough and Booth, Circuit Judges

Opinion—August 13, 1935

Stone, Circuit Judge, delivered the opinion of the court:

This is a petition to review a redetermination of income taxes for the year 1928. Alonzo T. Rand died intestate on [fol. 43] October 31, 1925, leaving a large estate of real and personal property. As one of the heirs, petitioner received from the estate certain corporate stock on January 28, 1927, under an order of distribution. On May 28, 1928, he sold this stock at a profit.

Petitioner claimed the right to return this profit as capital gains. The Commissioner denied this claim and treated the profit as ordinary income. The ground for such denial was that the stock had not been held by petitioner "for more than two years" and therefore did not constitute "capital assets" subject to the application of the "capital gain" rate under the applicable Revenue Act of

1928, Sec. 101(a), (c) (1) and (c) (8). Whether such holding was for more than two years, depends upon whether it began at the death of Alonzo T. Rand or at the date of distribution of this stock to petitioner. The Board confirmed the Commissioner (30 B. T. A. 1464), upholding date of distribution. This it did upon the authority of McFeely, 29 B. T. A. 998, and Dibblee, 29 B. T. A. 1070, without further statement of reasons. These two citations have passed to affirmance in McFeely v. Helvering, 74 Fed. (2d) 1017, C. C. A. 3 and Dibblee v. Helvering, 75 Fed. (2d) 617, C. C. A. 9. The same view has been taken in Ogle v. Helvering, 77 Fed. (2d) 338, C. C. A. 2 (where the petitioner was another heir of Alonzo T. Rand) and the contrary view is declared in First Nat. Bank of Boston v. United States, 76 Fed. (2d) 200, C. C. A. 1. The only issue here is whether petitioner's holding of this stock began at death of Alonzo T. Rand or at date of distribution.

Section 101(a) permits a flat rate of 12½% of "capital net gains" in lieu of surtaxes—at the option of the taxpayer. Section 101(c) contains the definitions for application of this flat rate. "Capital net gain" is defined, (c)(5), as being "capital gain" less certain deductions. "Capital gain" is defined, (c)(1), as taxable gain from the sale or exchange of "capital assets". "Capital assets" are defined, (c)(8), as being "property held by the taxpayer for more than two years", with certain exceptions not here pertinent. A portion of (c)(8) is as follows:

"For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property ex- [fol. 44] changed, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution."

Concisely stated, the opposed contentions of the parties are as follows. The Commissioner urges two matters: (1) That the holding period of more than two years must be construed under the influence of Section 113 (a) (5) which declares the basis for determining gain (for ordinary income tax purposes) from sales of property transmitted at death and that such basis is, as to intestate estates, "the fair market value of the property at the time of the distribution to the taxpayer". The reason advanced for this position is that the two sections are "applicable to different elements of the same or like transactions"—a reason which, he contends, is particularly fortified by the inclusion in the definition of capital assets of the requirement in 101 (c) (8) (B) as to tenure of a predecessor (in certain situations) in estimating the two-year period. (2) That standing unaffected by section 113, "held" as used in Section 101 (c) (8) must be construed as being from date of distribution, because such results from giving that word its ordinary meaning.

The position of petitioner is (1) that section 113 has nothing to do with 101 (c) (8) as to the issue here and (2) that "held" should be construed as beginning with the time [fol. 45] he acquired the stock which was the date of death. The reasons urged as supporting the exclusion of consideration of Section 113 are that its inclusion would result in different applications of Section 101 depending solely on differences in kind of property transmitted by death and differences in form of transmission from decedent; that it would defeat the prime purpose of section 101; and, as to 101 (c) (8) (B), that it has no bearing on the issue here except to accentuate the intention of Congress to broaden rather than restrict the influence of the capital gains section (101). The reasons for construing "held", in 101 (c) (8), as beginning with the death are that the holding begins

necessarily when the stock is acquired and that it has been judicially determined (Brewster v. Gage, 280 U. S. 327) that such property is acquired at the death.

Application of Section 113.

It seems logical to inquire first whether Section 113 should be considered in construing Section 101 (c) (8) because if it is then we are not controlled by the construction of 101 (c) (8) standing alone. In such inquiry, it is advisable first to determine the influence upon this consideration of Section 113 which may be exerted by paragraph (B) of 101 (c) (8). The sole effect of that paragraph is to extend the period of holding in those instances where section 113 has gone further back than the actual acquisition by the taxpayer—such as in gifts, where the holding of the donor is regarded as that of the donee taxpayer for estimating income tax gain purposes (section 113 [a] [2]). The effect is to create a substituted for an ordinary legal basis with the result that tenure or holding is thereby (in a sense) artificially extended. Where the normal legal tenure reaches to the earlier date, there is no place for such extension. Clearly, property cannot in any true sense be "held" until the holder has some character of legal interest therein. A residuary legatee or an heir of an intestate has a legal interest from time of death so it is entirely reasonable that such legatee or heir might be designated as holding from death and Revenue Statutes prior to the Act of 1928 have been so construed (Brewster v. Gage, 280 U. S. 327). Therefore, there is no place in such a situation to employ a substituted extension to carry the "acquisition" of legal interest back to death. We think neither paragraph (B) nor any inference from it is of any aid here.

[fol. 46] Taking up next whether section 113 is so related in its subject matter to section 101 that they should be construed together. This question seems directly determined by Helvering v. N. Y. Trust Co., 292 U. S. 455, when considered in connection with the situation here. In that case the court was faced with the problem of whether a trustee who had sold property less than two years after creation of the trust but more than two years after acquisition by the creator of the trust was entitled to the advantages of the capital gains provision of the Revenue Act of 1921. The capital gains section of that Act was section 206 which was

the forerunner of section 101 here. Section 202 of that Act is the forerunner of section 113 here. In construing the language of section 206 (a) (6), defining "capital assets", the court said that the language there (as here in section 101) "held * * * for more than two years" standing alone might be entirely clear as meaning only from creation of the trust (pp. 463, 464, 465) but that "Sections 202 (a) (2) and 206 (a) (6) are included in the same Act and are applicable respectively to different elements of the same or like transactions and are not to be regarded as wholly unrelated" (p. 467). The Court then construed the two sections together in the light of the legislative history and the object intended to be accomplished and determined that "held * * *, for more than two years" included (in the case of this trustee who was regarded as a donee under 202[a][2]) the period of holding by the creator of the trust.

In that case, the ambiguity as to the meaning to be given "held", in the statutory expression "held * * * for more than two years", arose when the language used was compared with facts or transaction in respect of which the intent and purpose was to be ascertained (p. 465). The situation here presented demands the same treatment. This statute is a whole and states the requirements as to income taxation. In construing any part of it, such construction must have the entirety in mind. This is merely applying a fundamental rule of construction—applicable alike to statutes, instruments and transactions. The particular matter to be construed will indicate what, if any other parts of the statute might be affected. The purpose and legislative history (Helvering v. N. Y. Trust Co., 292 U. S. 455, 464) of these various related parts of the Act will guide to the proper meaning for all of them.

[fol. 47] Here there is a clear relation between section 113 and section 101. Both deal with taxation of gains derived from sales of property. The former determines the measurement of such gains for all income tax purposes, irrespective of rate of taxation to be applied. Such measurement required a statement, in general or particular terms, of the base value date and such dates are stated therein as to various situations. Section 101 is a rate of tax provision applicable to the taxable sale gains as measured in 113. Section 101 required a prescribed holding period to make its privileges available to the taxpayer—obviously, any holding

period must have a legal beginning or base value date. Thus the situation is that of a taxable gain measure base value date (Section 113) and a tax rate base value date (Section 101) upon the gain so measured—both applying to the same character of gain, to-wit, from sales of property. Clearly the two are closely related and there should be no construction as to this date in 101 without regard to 113.

As the two sections should be considered together, we pass to the purpose of 101 to ascertain in what respect that is affected by 113. This purpose is clear (67th Congress, 1st Session, House Report No. 350, p. 10 and Senate Report No. 275, p. 12; Helvering v. N. Y. Trust Co., 292 U. S. 455, 466; Helvering v. Bliss, 293 U. S. 144, 148). The situation sought to be remedied by this section was as follows. The income tax period was one year and covered gains during the year. Enrichment through mere increase in value of property was not regarded as taxable gain until there was a realization thereof through sale or otherwise (McLaughlin v. Alliance Ins. Co., 286 U. S. 244, 249; Weiss v. Wiener, 279 U. S. 333, 335). Such realization might, and often did, represent the accumulating increase over many years yet the entire gain was taxed to the year in which realized. Often this would raise the taxable income considerably in the surtax rate brackets. Where such raise would occur, it prevented many sales and the realization of taxable gains therefrom. "In order to permit such transactions to go forward without fear of a prohibitive tax" (House Report, supra), the Revenue Act of 1921, Sec. 206, introduced the plan of a flat restricted surtax rate applicable to such situations and made its use optional with the taxpayer. The sole purpose of such provision was "to relieve gain thus derived [fol. 48] of the heavy surtaxes then applicable" (Helvering v. Bliss, 293 U. S. 144, 148). While the provision is to be construed liberally (Helvering v. Bliss, 293 U. S. 144, 150-151) to effect this purpose, it is obvious that construction should be confined to the purpose.

It was no part of the intention of Congress that the taxpayer should escape payment on any portion of the taxable gain—no matter over what period the gain had accumulated. The remedy was solely by an optional special rate of taxation upon such gain which rate might be advantageous to the taxpayer. The important thing was the amount of the tax to be paid and this was brought

about through the combined effect of rate and taxable gain—the difference was solely in rates. If the taxpayer had held the property only during the tax year of realization, clearly there was no purpose in relieving him from any part of the regular tax. Congress had in mind the one situation of gain accumulated over a longer period. This it clearly expressed in the requirement that the property should be "held" for more than two years. Nor was Congress interested in accumulations which were not taxable to the taxpayer involved for such lay entirely outside its purpose in enacting the capital gains rate. The only thing involved was accumulations of taxable gain by the particular taxpayer. Therefore, to give full effect to the purpose of 101 and, at the same time, to limit that section to its full purpose, the two-year period must be construed as controlled by the taxable gain provisions of section 113—unless (not true here) Congress has clearly expressed some other intention.

So applying section 113, we find that it expressly fixes the base value date for measuring taxable gain from sales by the heir of an intestate as being the date of distribution to him of the property sold. Accumulations prior to that date do not affect his tax because his measurement of taxable gain begins with that date.

Petitioner argues that such a result produces a difference in like situations which amounts to an absurdity. It is true that difference exists under 113 in the measure of taxable gain, because as to real property and specific devises of personalty taxable gain dates from death while as to personalty devolving through residuary devise or intestacy taxable gain dates from distribution. Also it is true that if 101 is construed as controlled by this measure of taxable gain, a corresponding difference will appear in the meas- [fol. 49] urement of the more than two-year period under 101 and therefore in the right to come under that section. However, this difference is so clearly expressed in 113 that there can be no room for construction as to what Congress meant as to the measure of taxable gain in the above instances, and there can be no question of the power to make such distinction (Helvering v. N. Y. Trust Co., 292 U. S. 455, 467; Brewster v. Gage, 280 U. S. 327, 335). The argument then amounts to a claim that to carry this difference into 101 by construction results in an absurdity not to be attributed to Congressional intention. The reason urged

for existence of such absurdity is that it would result in different treatment of like situated taxpayers. Like situated in what respect? Obviously, in respect to the time (death) when property interest may be regarded as attaching to the property. But this like situation did not appear judicially in connection with taxing statutes until Brewster v. Gage, supra, which was decided in 1930, after enactment of the Revenue Act of 1928. Before that decision, Congress might well have felt doubtful as to whether for taxation on sales gains it should or, possibly, could adopt the same standard of date of beginning of holding—acquisition—for real estate and specific devises of personalty as for personalty coming residuary or intestate. This doubt is strongly intimated in the Senate Report (No. 960, 70th Congress, 1st Session, p. 26) on the Act of 1928, and is directly declared in the Reports (73rd Congress, 2nd Session, H. R. No. 704, p. 28, and S. R. No. 558, p. 35) on the Act of 1934, made after Brewster v. Gage, as follows:

"Section 113 (a) (5) of the Revenue Act of 1932 is a re-enactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to meaning of the term 'date of acquisition', which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (Brewster v. Gage, 280 U. S. 327). Section 113 (a) (5) of the bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal."

[fol. 50] In this view of the Congressional mind as to the law when considering the 1928 Act, it is clear that the similarity of situation was by no means then clear.

But there is another consideration in this regard. To construe 101 as petitioner contends produces the situation following. The purpose of 101 is to afford relief from excessive surtaxes as to realized gains accumulating for more than two years in the taxpayer; such gains on real estate and specific devices are measured from death and the more than two-year period under 101 begins at that

time; such gains on personalty derived as residuary legatee or in intestacy are measured from distribution yet the period under 101 goes back further to the death. A possible result (as here) is that specific property may be identified to the residuary legatee or heir only a few months before sale by him so that he could not have known longer than those months either the property he could sell or, more important here, what the tax effect upon him of the sale would be and yet he could avail himself of a statute passed for the one purpose of not retarding sales because of the tax result arising from accumulation of gain for more than two years. Thus parties in like position, as to the purposes of 101 to relieve from accumulations of gains), are differently treated and one of them given an advantage much beyond the fullest purpose of the statute. If construed as the Commissioner contends, all derivators from an estate are, as to the purposes of the section, treated exactly alike.

While we are convinced that section 101 should be construed in the light of section 113, yet the result would be the same if section 101 were alone considered for then the language there used would govern and that language clearly limits "held" to the period after distribution (Helvering v. N. Y. Trust Co., 292 U. S. 455, 463, 464, 465).

The determination of the Board is Affirmed.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT

No. 10224

REFUS R. RAND, JR., Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue

On Petition to Review Decision of United States Board of Tax Appeals

DECREE—August 19, 1935

This cause came on to be heard on the petition to review a redetermination by the United States Board of Tax Appeals of the income taxes of the petitioner, Refus R. Rand, Jr., for the year 1928, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of redetermination of the said Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

And it is further ordered, that the said petition to review in this cause be, and the same is hereby, dismissed without the taxation of costs in favor of either of the parties in this Court.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF PETITIONER FOR STAY OF MANDATE—Filed Aug. 22, 1935

Comes now the above named petitioner, Rufus R. Rand, Jr., by Robert Driscoll, his attorney, and respectfully moves this Honorable Court to stay and withhold its mandate in the above entitled action for the purpose of permitting said petitioner to file with the Clerk of the Supreme Court of the United States his petition for a writ of certiorari in said cause, until and including the 23rd day of September, 1935, and to order that the stay of said mandate be continued, if on or before that date said petition is filed and the Clerk of this Court receives from the Clerk of the Supreme Court his certificate of said filing, until the final disposition of said cause by the Supreme Court of the United States, all as provided by Rule 32 of this Court.

Dated August 20th, 1935.

Robert Driscoll, Attorney for Rufus R. Rand, Jr., Petitioner, 1300 First National-Soo Line Building, Minneapolis, Minnesota. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker; Cobb, Hoke, Benson, Krause & Faegre.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—August 26, 1935

On Consideration of the motion of petitioner for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari,

It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 137.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,993. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 439. Rufus R. Rand, Jr., Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for writ of certiorari and exhibit thereto. Filed September 12, 1935. Term No. 439, O. T., 1935.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 439

RUFUS R. RAND, JR.,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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Supreme Court of the United States

OCTOBER TERM, 1935.

No.....

RUFUS R. RAND, JR.,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Rufus R. Rand, Jr., prays for a writ of certiorari to review an opinion of the United States Circuit Court of Appeals for the Eighth Circuit (.... F. (2) ...; R. 41-48), filed on August 13, 1935, affirming an order of redetermination of the United States Board of Tax Appeals (R. 28).

OPINIONS BELOW.

The memorandum opinion of the United States Board of Tax Appeals (R. 13-17) was rendered May 24, 1934, but is not officially reported. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 41-48)

was filed August 13, 1935, and is found at .... F. (2) ....; (353-A Commerce Clearing House, Par. 9542; Prentice Hall, Inc., Federal Tax Service 1935, Par. 1789).

JURISDICTION.

This petition is submitted under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938. The date of the judgment asked to be reviewed is August 19, 1935 (R. 48-49).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Alonzo T. Rand died intestate domiciled in Minnesota on October 31, 1925 (R. 40, 34). Among the assets of Mr. Rand's estate (which assets greatly exceeded in market value the liabilities of the estate (R. 34)) were 962 2/3 shares of the capital stock of Minneapolis Gas Light Company. On January 28, 1927, pursuant to a decree of distribution, these shares were distributed to Petitioner as one of the heirs of said intestate (R. 33).

On May 28, 1928, Petitioner sold said shares for $439,261.05, realizing thereby a taxable gain of $269,841.72 (R. 33). In his income tax return for the calendar year 1928, Petitioner reported said gain as capital gain on the theory that it was derived from the sale of capital assets, within the meaning of Section 101 of the Revenue Act of 1928. Respondent contends that said gain was taxable as ordinary income at the normal and surtax rates. The United States Board of Tax Appeals entered its decision for the Respondent. The Board's conclusion was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. If Respondent's contention is correct, the deficiency

in Petitioner's income tax for the calendar year 1928 is $20,736.45 (R. 34). If Respondent's contention is not correct, Petitioner has made an overpayment of income tax for the calendar year 1928 in the amount of $13,545.09 (R. 33).

QUESTION PRESENTED.

May shares of stock acquired by inheritance from an intestate, who died October 31, 1925, and not sold or otherwise disposed of until May 28, 1928, be said not to have been held for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, 45 Stat. 791, 811, merely because the distribution of the shares by the administrators of the intestate's estate was not effected until January 28, 1927?

REASONS FOR ALLOWANCE OF WRIT.

1. The decision below is in direct conflict with the decision rendered by the United States Circuit Court of Appeals for the First Circuit in *First National Bank of Boston vs. United States* (1935), 76 F. (2) 200, and was recognized by the Court below so to be in conflict when it said (R. 41): "* * * the contrary view is declared in *First Nat.' Bank of Boston vs. United States,* 76 Fed. (2) 200, C. C. A. 1." A Petition for Certiorari has been filed with the Clerk of this Court by the Government in the *First National Bank of Boston* case and is No. 110 on the current docket.

2. The decision below is in direct conflict with the decision rendered by the United States Circuit Court of Appeals for the First Circuit in *Lee vs. Commissioner of Internal Revenue* (1935), 76 F. (2) 203. A Petition for a Writ of Certiorari has been filed with the Clerk of this Court by

the Government in the *Lee* case and is No. 111 on the current docket.

3. The point of law at issue in the instant case was taken by the United States Board of Tax Appeals to have been determined by *McFeely vs. Commissioner of Internal Revenue* (1934), 29 B. T. A. 998, affirmed (C. C. A. 3, 1934), 74 F. (2) 1017, in which case this Court *granted* a Petition for Certiorari on May 20, 1935, ... U. S. ... (Docket No. 24).

4. The decision below is in conflict with the principle enunciated by this Court in *Brewster vs. Gage* (1930), 280 U. S. 327, that a distributee acquires property from the estate of an intestate as of the date of the intestate's death and not as of the date of distribution.

5. The decision below is in conflict with the principle enunciated by this Court in *Helvering vs. Bliss* (1934), 293 U. S. 144, that the capital gain sections of the Federal Revenue Acts are liberalizations of the law and are not to be narrowly construed.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Minneapolis, Minnesota.

Of Counsel:
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COBB, HOKE, BENSON, KRAUSE & FAEGRE.

FILED
OCT 21 1935
CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 439.

RUFUS R. RAND, JR.,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 439.

RUFUS R. RAND, JR.,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (R. 13-16) is not reported. See 30 B. T. A. 1460, 1464. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 40-48) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered August 19, 1935 (R. 48-49). The petition for a writ of certiorari was filed September 12, 1935, and was granted October 14, 1935. The jurisdiction of this Court rests on

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether shares of stock acquired by inheritance from an intestate who died October 31, 1925, and not sold or otherwise disposed of until May 28, 1928, may be said not to have been held for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928 merely because distribution of the shares by the administrators was not effected until January 28, 1927.

STATUTES INVOLVED.

The statutes involved are set forth in the appendix, *infra*, pp. 40-42.

STATEMENT.

The facts are not in dispute. They were found by the Board (R. 13-16) as stipulated by the parties (R. 32-34).

Alonzo T. Rand, a resident of Minnesota (R. 40), died intestate October 31, 1925. At his death he was the owner of 4,813 1/3 shares of the common capital stock of the Minneapolis Gas Light Company. Petitioner, Rufus R. Rand, Jr., was one of the heirs,[1] and on January 28, 1927, pursuant to a decree of distribution, 962 2/3 of the shares were distributed to him. The fair market value of petitioner's shares at that time was $176 each, a total of $169,419.33 (R. 14).

---

[1] The case of another heir is pending before this Court on certiorari to the Second Circuit. Kate A. Ogle vs. Commissioner, October Term, 1935, No. 137. The facts are substantially the same, and the question presented is identical. The cases of two other heirs, Elizabeth Rand Anderson and Mary Rand Stone (since deceased) are pending in the Circuit Court of Appeals of the Second Circuit under stipulations to abide the event of the Ogle case.

Rand's estate had a fair market value at death of not less than $2,104,748. Included among the assets were $223,814.73 in cash, and United States Government obligations worth $145,829.60, the two items totalling $369,644.33. During administration and prior to January 28, 1927, the estate had cash receipts of $161,995.97. All the estate's debts and obligations, including those payable after distribution as well as those paid or payable before that time, amounted only to $263,832.29 (R. 15).

On May 28, 1928, petitioner sold his shares for $439,261.05, thereby realizing a taxable profit of $269,841.72.[2] In his income-tax return petitioner reported the gain as capital gain, on the theory that under Section 101 of the Revenue Act of 1928 it was derived from the sale of capital assets. Respondent contends that the profit was ordinary income taxable at normal and surtax rates, and asserted a deficiency accordingly. The Board approved the Commissioner's determination, and its decision was upon appeal affirmed by the Circuit Court of Appeals. The deficiency, if respondent's contention is correct, is $20,736.45. If his contention is not correct, petitioner is entitled to a refund of $13,545.09 (R. 14-15, 17, 33, 48-49).

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in holding that the profit realized by petitioner was ordinary income subject to tax at normal and surtax rates, and in not holding that said profit was capital gain within Section 101 of the Revenue Act of 1928.

---

[2] The correct figure would seem to be $269,831.72; the market value of all the shares at distribution, computed at $176 each, would amount to $169,429.33 rather than the $169,419.33 stipulated. However, the profit stated in the text, having been agreed to, may be taken as correct.

2. The Circuit Court of Appeals erred in affirming the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT.

It is evident, both as a matter of ordinary reasoning and in the light of the history of the statute, that for purposes of the general definition of capital assets contained in Section 101 (c) (8) of the Revenue Act of 1928 the period of holding of an asset must be deemed as beginning at the time the property is acquired.

That petitioner acquired the shares here in question at the date of intestate's death and had therefore held the same for more than two years before sale, and is therefore entitled to have his gain taxed at the rate applicable to capital gains, is settled by *Brewster vs. Gage*, 280 U. S. 327, where it was determined upon similar facts that personal property acquired by bequest or intestacy is acquired at the date of the decedent's death. *Brewster vs. Gage* is none the less controlling because a different statute was there involved, for that statute turned on the same ultimate fact as does Section 101 (c) (8) of the Revenue Act of 1928, the statute here under consideration; the fact itself remains the same, and the Government has so recognized, both in cases and in rulings, which were recognized by Congress by reenactment of the "Capital Asset" definition in the 1928 Act without material change.

This construction of Section 101 (c) (8) is the only one which can be reconciled with Section 168, which clearly recognizes the vesting of the interest of a beneficiary in an estate at the time of death. It also conforms to the general rules of property recognized in Minnesota and elsewhere.

Helvering vs. New York Trust Company, 292 U. S. 455, is distinguishable and does not require the conclusion that the definition of capital assets in Section 101 (c) (8) is inferentially modified by Section 113 (a) (5) of the same Act, which provides that the basis for gain or loss upon disposition of property acquired by intestacy shall be the fair market value of the property at the time of distribution. The shares in the *Trust Company* case were not within the statutory definition, whereas those here involved are. In the *Trust Company* case, moreover, a following of the definition of capital assets according to its terms would have penalized the taxpayer; in the present matter the exact contrary is true. And, finally, if the definition had been taken literally in *Helvering vs. Trust Company*, the policy of Congress to stimulate profit-taking transactions would have been defeated; adherence to the language of the statute in this case would involve no such result.

Section 113 (a) (5) was not enacted for the purpose of arbitrarily fixing time of distribution as acquisition date. At the time of its enactment there was some doubt as to when in cases of intestacy acquisition takes place, and that question was for that reason deliberately avoided and left at large in Section 113 (a) (5). That section is concerned only with *manner* of acquisition, not at all with time of acquisition.

Had it been the purpose of Congress in all cases to require that basis date be arbitrarily regarded also as date of acquisition for capital-gain purposes, it could easily, and it is reasonable to suppose that it would, have inserted in the law a general provision to that effect. Instead, in subdivisions (A), (B) and (C) of Section 101 (c) (8) it singled out three situations, none of them applicable here, wherein time of acquisition and basis date did not coincide,

and as to such situations specifically provided that the former should be controlled for capital-gain purposes by the latter. This special provision covering the situations thus singled out negatives any intent on the part of Congress that time of acquisition should in all cases be regarded as being the same as the basis date.

Subdivision (B) of Section 101 (c) (8) is not applicable. By its terms it is limited to situations where a taxpayer's basis date is earlier than acquisition date—in other words, where the taxpayer's base is a substituted one. Such a situation is that of a donee of a gift *inter vivos*, and it was to that that the subdivision was directed. Subdivision (B) is confined to situations involving successive tenures. There are no successive tenures here; the taxpayer's tenure, equally with that of the personal representative of the decedent's estate, began at the time of decedent's death. Subdivision (B), moreover, was enacted for the purpose of broadening or liberalizing the capital assets definition. Under the Government's contention the provision is given a contrary effect.

The Commissioner's position violates the rule that statutory language should be given a sensible construction according to its natural import, and results in reading into the law numerous absurdities, discriminations, and injustices, things which should never be attributed to a lawmaker so long as another interpretation is permissible which avoids them.

The Commissioner is arguing for a narrow interpretation of the capital-gain provisions. In doing so he proceeds in complete disregard of *Helvering vs. Bliss*, 293 U. S. 144, wherein this Court definitely laid down the rule that those provisions are to be given a liberal construction in the taxpayer's favor.

ARGUMENT.

The only issue is whether on the date of their sale, May 28, 1928, petitioner's shares of stock were "capital assets," which for Federal income-tax purposes is defined by Section 101 (c) (8) of the Revenue Act of 1928, *infra*, the Act here involved, as meaning "property held by the taxpayer for more than two years." If petitioner had held the shares for that length of time, he was subject to tax on his profit only at the flat rate specified in Section 101 (a), *infra*, whereas if his ownership was for less than two years the ordinary graduated rates were applicable. Petitioner acquired the securities through inheritance from Alonzo T. Rand, who died October 31, 1925. The Board and the court below concluded nevertheless that petitioner had held the shares only since January 28, 1927, because not until then was their formal distribution to him effected. That conclusion, we submit, is plainly erroneous.

I.

THE PERIOD OF HOLDING BEGINS AT THE TIME OF ACQUISITION.

The definition of capital assets made in Section 101 (c) (8) is a concise one. Except in respect of such situations as fall within the provisions of any one of the three subdivisions (A), (B) and (C), the one and exclusive test laid down by the statute is whether the taxpayer has held the property for more than two years. Since none of the subdivisions mentioned is applicable here, as the court below held (R. 43-44) and as we shall point out in some detail later in this brief, the result is that under the language of the statute the inquiry relates primarily and solely to when petitioner's period of holding began.

Quite obviously, where, as here, there is no applicable statutory fiat to the contrary, property must be regarded as held or owned from the time it is acquired. No other view is reasonably possible, for manifestly an owner's period of holding of an asset can begin neither before nor after his acquisition of the property. In any event, it is plain that no other view is contemplated by the statute. The capital-asset provisions were first written into the law as part of the Revenue Act of 1921, c. 136, 42 Stat. 227. Section 206 (a) (6) of that Act corresponds to Section 101 (c) (8) of the 1928 Act. In the former "capital assets" was defined as meaning "property *acquired* and held • • • for more than two years." (Italics supplied.) The use of the word "acquired" in the 1921 definition obviously made that definition neither broader nor narrower than the definition contained in the 1928 Act. The word was plainly surplusage; it was dropped in the 1924 Act (Section 208 (a) (8), R. A. of 1924, c. 234, 43 Stat. 253), and neither the House Committee on Ways and Means nor the Senate Committee on Finance indicated in its report that it thought any change in the law was thereby effected. See House Report No. 179, 68th Congress, 1st Session, pp. 19-20; Senate Report No. 398, 68th Congress, 1st Session, pp. 21-22. As said in *First National Bank vs. United States* (C. C. A. 1st), 76 F. (2d) 200, 202:

> In the 1921 Revenue Act, Section 206 (a) (6), 42 Stat. 232, it was provided that to constitute capital assets, property must be "acquired and held" for two years. In subsequent acts the word "acquired" has been omitted, the obvious reason is that the word "acquired" was surplusage, since, in general, property is held from the time it is acquired or one's ownership begins.

These views are in accord with what this Court has said. In the recent case of *Helvering vs. New York Trust Co.*, 292 U. S. 455, it was pointed out (p. 469) that "capital assets" has the "same definition in the Acts of 1921, 1924 and 1926." Moreover, the Court had just remarked (p. 468) that Section 208 (a) (8) of the Revenue Act of 1926, c. 27, 44 Stat. 9, which is identical, so far as here of interest, with Section 208 (a) (8) of the 1924 Act and Section 101 (c) (8) of the 1928 Act, "contains substantially the same language as that used in the 1921 Act to define capital assets."

It is difficult to understand how the court below could cite this decision as holding that the "language [of Section 101] clearly limits 'held' to the period after distribution," particularly when the majority opinion of this Court in the New York Trust Co. case frankly conceded that "strictly according to the letter" and giving the words their "natural significance" a different result would necessarily be reached.

See also *Lee vs. Commissioner* (C. C. A. 1st), 76 F. (2d) 203, 204. To the same effect is *Shaffer vs. Commissioner*, 28 B. T. A. 1294, wherein the manifestly correct observation was made that "the two-year period * * * begins to run from the date of petitioner's acquisition of the property * * *." See also *Hooper vs. Commissioner*, 26 B. T. A. 758, 760.

The issue obviously resolves itself into a question of determining when petitioner acquired the property which he sold on May 28, 1928.

II.

The Time of Petitioner's Acquisition Was the Date of Decedent's Death.

The question of when property is acquired, under facts similar to those here involved, was definitely determined by this Court in *Brewster vs. Gage,* 280 U. S. 327, and the decisions below are in their effect plainly contrary, we submit, to the pronouncement there made. In that case the issue was whether certain stocks received under a will as the residue of an estate were acquired by the residuary legatee at the date of the testator's death or at the time of their distribution. This Court held that acquisition was at death, and in doing so recounted the rules generally applicable, in Minnesota (*Granger vs. Harriman,* 89 Minn. 303, 304-305, 94 N. W. 869), as elsewhere, to the descent and distribution of personal property. It said (p. 334):

> Upon acceptance of the trust there vests in the administrators or executors, as of the date of death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators to deliver it to them. The legal title so given relates back to the date of death. * * *
>
> Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property. * * *

This Court concluded accordingly that the time of the taxpayer's acquisition of the shares was the date of the testator's death. See also *Security Trust Co. vs. Commissioner* (C. C. A. 6th), 65 F. (2d) 877; *Hopkins vs. Commissioner* (C. C. A. 7th), 69 F. (2d) 11, certiorari denied 293 U. S. 560; *Chandler vs. Field* (C. C. A. 1st), 63 F. (2d) 13; *Conrad vs. Commissioner*, 27 B. T. A. 741; I. T. 1889, III-1 Cumulative Bulletin 70. Cf. *Lane vs. Corwin* (C. C. A. 2d), 63 F. (2d) 767, and *Pringle vs. Commissioner* (C. C. A. 9th), 64 F. (2d) 863.[3]

The legal concept that the interest of a beneficiary vests at the date of testator's death is not confined to cases involving tax matters. It is generally recognized in Minnesota as well as elsewhere as applicable to all questions relating to the inheritance of personal property. In *Granger*

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[3] In reaching the opposite conclusion in the present case the Board relied (R. 16) upon its prior decisions in McFeely vs. Commissioner, 29 B. T. A. 998, and Dibblee vs. Commissioner, 29 B. T. A. 1070, in each of which upon somewhat similar facts the Board in effect held that the property was not acquired until distribution. The reason, the Board said in both instances, was that prior to that time the taxpayer was without possession of specific assets. Cf. Section 168 of the Revenue Act of 1928, infra. But that was the situation in the Brewster case, and if it was true of the taxpayer there that he acquired the property at the date of the decedent's death, it is no less true of the taxpayer here. Ownership and holding began at that time in the one instance as in the other, and no reason has been adduced, and none occurs to us, why what was said and decided in the Brewster case is not as fully true in the one situation as it was in the other. In neither the McFeely nor the Dibblee case did the Board even mention Brewster vs. Gage. Only in the dissenting opinion in the Dibblee case is the Supreme Court's decision referred to. It is there recognized as controlling, however.

It is interesting to observe that no authorities are cited in support of the Board's conclusion in the Dibblee decision, and that in the McFeely case the Board relied only upon Johnson vs. Commissioner (C. C. A. 3rd), 52 F. (2d) 726, and Schoenberg vs. Commissioner (D. C. App.), 55 F. (2d) 543, cases dealing with different situations, both of which have since been overruled by this Court in its recent New York Trust Co. decision, supra, note 3.

The decisions in the McFeely and Dibblee cases have since been affirmed by Circuit Courts of Appeals. In the McFeely case affirmance was without discussion, on the ground that no principle of importance was involved. McFeely vs. Commissioner (C. C. A. 3d), 74 F. (2d) 1017. Affirmance in the Dibblee case was accompanied by an opinion but there again Brewster vs. Gage was not even referred to. Dibblee vs. Commissioner (C. C. A. 9th), 75 F. (2d) 817.

vs. Harriman (supra), the Minnesota Supreme Court recognized that where, as in A. T. Rand's estate, the liquid assets greatly exceed the amount of all debts the heirs as a practical matter know from the time of the decedent's death exactly what property each of them is entitled to and can validly and effectively pay the debts and divide the property, dispensing entirely with the formalities of administration. It was there said at pages 304-305:

> Subject to this right of possession and qualified title [in the personal representatives], the property descends direct to the heirs, and no final decree is necessary where those entitled to the estate agree upon a division of the same. The substantial facts accomplished by the administration are the payment of debts and the distribution of the residue of the property. So that, if there are no debts and a division of the property is amicably made by those entitled to it, nothing remains for an administrator to act upon. Many of the authorities sustain the right of the interested parties in such cases to dispense with an administration, even before the time limited for creditors to appear and present their claims, by paying all debts, or showing that none existed, and distributing the property among those entitled to it. [Citing cases.]

See also *Barnes vs. Verry,* 174 Minn. 173, 177, 218 N. W. 551;

Vail vs. Anderson, 61 Minn. 552, 555, 64 N. W. 47.

It is no answer to *Brewster vs. Gage* to say, as the court below intimated (R. 44), that application of a different statute was there involved. The important thing is that there, as here, the only issue was when as a matter of law and fact the property was acquired, and it is obviously of

no moment that different statutes attach different consequences to the same ultimate fact. It was the Government, not the taxpayer, that argued in *Brewster vs. Gage* that death was the time of acquisition. That position was right, and the Government prevailed. The Government can hardly with consistency now claim, merely because it is the applicability of a different statute which turns upon that same ultimate fact, that some other time is the time of acquisition. If it is to be said for one purpose that a taxpayer has held property from the time of a decedent's death, then the same thing should be said where that same fact is important for other purposes.

That this is so the Government has itself recognized. In the *Security Trust* and *Conrad* cases, *supra*, for example, the Commissioner in each case contended, upon facts legally parallel with those here involved, that under *Brewster vs. Gage* certain shares of stock were acquired by the taxpayer at the date of the decedent's death, and, since that was more than two years before sale was made, he computed the tax upon the resulting profit at the rate applicable to capital gains, whereas if the taxpayer had held the shares only from the date of distribution the profit was taxable at the rates applicable to ordinary income. In both cases the Revenue Act involved was that of 1926, wherein the definition of capital assets, so far as here important, is identical with that in the Revenue Act of 1928.[4]

Even before *Brewster vs. Gage* was decided, moreover, the Income Tax Unit of the Bureau of Internal Revenue

[4] The fact that the profits in Security Trust Co. vs. Commissioner were taxed at the capital-gain rate is shown only by the record in that case. In the Conrad case the rate used is shown in the Board's decision, 27 B. T. A. 741, 743. Since application of the capital-gain rate is optional with the taxpayer (see Sec. 101 (a) of the 1928 Act, infra), no dispute would arise where the Commissioner agrees to its use, and the consequence is that few, if any, of the court decisions refer to what rate of tax is applied.

had formally ruled that for capital-gain purposes the holding period of an heir or legatee runs from the decedent's death. It was so held in I. T. 1889, III-1 Cumulative Bulletin 70, with respect to Section 206 (a) (6) of the 1921 Act, and it will be observed therefrom that the foundation for the Government's conclusion is identical with that upon which this Court rested its decision in *Brewster vs. Gage,* namely, that in point of both law and actuality the distributee is the real owner of the property from the time of the decedent's death. Technical considerations have not in other instances, in matters relating to capital gains and losses, been allowed to work to the detriment of taxpayers by obscuring and defeating obvious facts. *Helvering vs. New York Trust Co., supra,* p. 465 (commenting on stock dividends); *Wood vs. Commissioner* (C. C. A. 1st), 75 F. (2d) 364 (dealing with stock acquired by exercise of rights). See also Section 168 of the Revenue Act of 1928, *infra.* They should not be allowed to do so here, particularly since under *Brewster vs. Gage* petitioner's shares are squarely within the letter of the statutory definition of capital assets.

III.

Reenactment of "Capital Assets" Definition Without Change in 1928 Act Confirms Departmental Rulings of Long Standing Sustaining Petitioner's Contention.

The definition of "capital assets" contained first in the 1921 Act has been reenacted in each subsequent Act without material change, except for the addition in the 1926 Act of what are now Subdivisions (A), (B) and (C) of the Section containing that definition, none of which are applicable to the case at bar.

The Commissioner of Internal Revenue, as early as 1923,

by I. T. 1719, II-2 Cumulative Bulletin 45, and by letter to Prentice-Hall, Inc., published in Prentice-Hall Tax Service for 1923 at pages 2703-4, and again in January, 1924, in I. T. 1889, III-1 Cumulative Bulletin 70, had definitely construed this definition as fixing the date of acquisition and the commencement of the holding period for a residuary legatee or heir as the date of the testator's death. So far as we have been able to ascertain these departmental rulings have never been modified or changed. They had been in effect for many years when the 1928 Act was passed, and in the 1928 Act the same definition of "capital assets" was reenacted. Under these circumstances, Congress must certainly have intended this definition to have the meaning given it by the Department during all of these years. *Helvering vs. Bliss*, 293 U. S. 144.

It is true that in the earlier case of *Helvering vs. New York Trust Co.*, 292 U. S. 455, a divided Court held that the reenactment in the 1924 Act of the definition of "capital assets" was not necessarily an adoption of the Commissioner's construction as set forth in two I. T.'s issued late in 1922 and 1923. The principal reason assigned for this conclusion by the majority opinion was that it did not appear that the attention of Congress had been called to these rulings, and that there was no ground on which to infer that Congress had intended to approve them.

In the *Bliss* case, on the other hand, this Court unanimously held that the reenactment in later Acts of the Sections therein questioned indicated Congressional approval of administrative interpretation contained in three rulings: —A telegraphic ruling by the Commissioner; an I. T. (income tax ruling by the Commissioner); and a Mim. (mimeographed instruction by the Commissioner to collectors).

If there is any inconsistency between the holdings on this

subject in the *Bliss* case and in the *New York Trust Co.* case, the *Bliss* case, being the later one and a unanimous decision of the Court, represents the present and established law.

We submit, however, that the facts in the two cases may be distinguished. In the first place, in the *New York Trust Company* case, the Commissioner was urging that the reenactment confirmed rulings in favor of the Government, whereas in the *Bliss* case, as in the case at bar, the rulings in question had been in favor of the taxpayer, and the Commissioner was, and is here, asking the Court to hold that such rulings were wrong, notwithstanding reenactment of the definition without change. In the second place, the rulings upon which the Commissioner was relying in the *New York Trust Co.* case had been comparatively recent, and the Court, therefore, could not infer that they had come to the attention of Congress, whereas in the *Bliss* case and in the present case the rulings relied upon have been in effect and unchanged for many years.

The Court might well, as it did in the *New York Trust Co.* case, hesitate to penalize a taxpayer on the ground that Congress had adopted a departmental ruling in favor of the Government by an Act passed shortly after the ruling. It would, however, be quite a different thing to penalize a taxpayer by refusing to recognize that Congress had adopted administrative rulings of long standing in favor of the taxpayer by reenactment of the "capital assets" definition in the 1928 Act.

IV.

Helvering vs. New York Trust Co., 292 U. S. 455, Does Not Require the Conclusion That Section 101 (c) (8) Is Inferentially Modified by Section 113 (a) (5).

While the court below conceded (R. 43, 48), as is obviously the case, that petitioner's holding period, under the language of Section 101, might begin at the date of decedent's death, it held nevertheless that the taxpayer should be penalized and deprived of the optional rate of tax thus plainly given him by the terms of that statute, on the ground (R. 44, *et seq.*) that the decision of this Court in *Helvering vs. New York Trust Co.*, 292 U. S. 455, compels the conclusion that Section 113 (a) (5) of the Revenue Act of 1928, *infra*, because it changed the basis for determining gain or loss upon the sale of personal property acquired by intestacy must be construed as changing the meaning of Section 101 which was reenacted without amendment in such a way as to prevent the latter statute from being applied as it had theretofore and according to the ordinary import of its language, and that in consequence petitioner must be regarded as having held the shares only from the time fixed by Section 113 (a) (5) as amended as the basis date. We submit that *Helvering vs. New York Trust Co.* requires no such holding, and that the view of the court below operates unjustifiably to broaden and extend what this Court there decided, and to do so in respect of a situation quite different as to both facts and principle involved.

The question at issue in the *New York Trust Co.* case was whether under the Revenue Act of 1921 securities received by gift in 1921 and sold in 1922 should be regarded as having been held for more than two years, in view of a statutory requirement that for purposes of determining gain or

loss upon a sale or disposition of the securities the basis to the donee should be the same as the property would have had in the hands of the donor, and the donor had acquired the property before March 1, 1913. This question this Court answered in the affirmative.[5]

Discussion of the issue was prefaced by the Court's admission (p. 463) that, contrary to what is true at bar, "if the words [of the capital-asset definition] alone are to be looked to, the shares were not by the taxpayer 'held * * * for more than two years.'" That should not be deemed conclusive, however, the Court said (p. 464), for "the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished," and the first obligation of a court in a matter of statutory construction, established by numerous quoted authorities, is to give effect to the law-makers' intent. Attention was then called (p. 466) to the purpose Congress had in mind in the enactment of the capital-gain provisions, which, as expressed in House Report No. 350, 67th Congress, 1st Session, pp. 10-11, was to "stimulate profit-taking transactions" by making optional a flat rate of tax, and in respect of that purpose this Court said (p. 466) that "there is no distinction between gains derived from a sale made by an owner who has held the property for more than two years and those resulting from one by a donee whose tenure plus that of the donor exceeds that period." That being true, this Court concluded (p. 467), it must be assumed that when Congress provided that a donee should be put into his donor's shoes for the purpose of getting a base, the

[5] It should be pointed out that three justices, Mr. Justice Roberts, Mr. Justice Brandeis, and Mr. Justice Stone, did not concur, on the ground that the definition of capital assets should be read and applied as written.

"continuity required" for that purpose "was also intended for use in finding the rate," that is, the holding period, and that therefore the two statutory provisions should be looked upon as "applicable respectively to different elements of the same or like transactions" and not "be regarded as wholly unrelated." It is obvious that only by taking that position could the Court make the legislative intent effective, and if the donee was to be put into the donor's shoes for the one purpose it was only right and just that he should be put there for the other; "it is to be inferred that Congress did not intend penalization" (p. 467). The result so reached was written directly into the statute in the Revenue Act of 1926 as part of Section 208 (a) (8). It has been retained in each succeeding law and appears as Section 101 (c) (8) (B) of the Revenue Act of 1928, *infra*.

Apparently forgetful of the rule that "always the language used in an opinion must be read in the light of the issues presented" (*Sinclair vs. United States*, 279 U. S. 749, 767; *Thorsen vs. Commissioner* (C. C. A. 9th), 65 F. (2d) 234, 236, affirmed, *Thorsen vs. Helvering*, 291 U. S. 163), the court below (R. 44) seized upon the words in *Helvering vs. New York Trust Co.* to the effect that the capital-asset definition and the basis provisions there involved were not to be regarded as wholly unrelated, and proceeded to deduce therefrom (R. 45, *et seq.*) that in any situation where, as here, basis date is different from acquisition date, the latter must unalterably be regarded as being the same as the former. We submit that this Court laid down no such sweeping and arbitrary rule, that the problem before the Court in the *New York Trust* case was in many respects quite different from that here presented, that the court below made an unsound application of the principles there found controlling, and that the conclusion reached in that case should be read

strictly in the light of and be limited to the facts there involved.

First. It is to be observed that in the *New York Trust* case this Court was admittedly dealing with a situation where the property in question was *not* within the letter of the capital-asset definition, whereas here the exact contrary is the case; here the shares were acquired more than two years before sale, while there they were acquired less than two years before sale. Thus whereas in the *New York Trust* case the issue was whether the taxpayer should be relieved from penalty by treating the shares as though they were within the definition in spite of the fact that they were not, the issue in the present matter is whether the taxpayer should be *subjected* to penalty by treating the shares as though they are not within the definition in spite of the fact that they are. In the *New York Trust* case this Court broadened the statute in order to confer on the taxpayer a benefit. The court below in the present controversy interprets that decision as authority for the proposition that the same statute may be narrowed in order to deprive a taxpayer of the same benefit. Obviously the situations in the two cases are not parallel. Obvious also is the fact that the rule applied by the court below is not the same rule as that applied by this Court. And equally obvious is a lack of harmony in result; in the one situation penalty was avoided; in the other it is imposed. Yet in *Helvering vs. New York Trust Co.* this Court said (p. 468) that it is to be inferred that Congress did not intend penalization.

The penalization of the taxpayer in the present situation becomes more apparent when we consider the fact that the sale of the shares involved here was actually made before the 1928 Act was enacted and in reliance on uniform administrative rulings which amply justified the taxpayer's

assumption that the shares had been held for more than two years.

Second. We submit further that, with respect to its relation to the purpose of Congress in enacting the capital-gain provisions, the situation at bar is unlike that in the *New York Trust* case. This Court there (p. 464) reaffirmed as sound the rule that a statute should be given effect according to its language, and that even hardship, if the sole consideration, is not sufficient to warrant a departure.[6] The exception, it was further made clear (p. 464), is limited to cases where "the expounding of a statutory provision strictly according to the letter" would "defeat the object intended to be accomplished"; if the words of a statute literally interpreted bring about a result at variance with the design and purpose of the enactment, it may be proper to sacrifice the language as written.

The legislative policy behind the enactment of the capital-asset definition, as set out in the *New York Trust Co.* opinion, was to "stimulate profit-taking transactions," and "to lessen hindrance caused by high normal and surtaxes." If it had not been held in that case that the shares there in question were capital assets, the obvious result would have been that the policy behind the statute would have been defeated. The court below in the present matter seems to have thought that the same result would follow if petitioner's shares were allowed to remain in the category of capital assets where the literal language of the law places them. That view is plainly not correct. We may assume as true, what the court below reiterates (R. 46, 48), that Congress had specifically in mind, in enacting the statute permitting the optional rate

[6] By departing from the language of the statute in the case at bar, the court below, as already noted, not only does not avoid hardship, but instead creates it.

on capital gains, gains accumulated over more than two years, whereas here the gains were accumulated over a shorter period. That consideration is not decisive, however. The fact is that the use of the optional rate in the present matter is entirely consistent with and even in furtherance of the fundamental policy of Congress of stimulating profit-taking;[7] the Government's contention in *Helvering vs. Trust Co.* would have operated actively to thwart and defeat this fundamental policy. The difference is a real one. The only justification for departing from the letter of the law, as the *New York Trust* decision expressly recognizes, is where otherwise the purpose of the legislature is defeated. We know of no authority, and neither the court below nor the Government has pointed to one, which holds that anything short of that is sufficient to permit disregard of otherwise clear language. The *New York Trust Co.* decision is not authority for the proposition that the clear language of a statute may be overridden when to do so serves or advances no established or plainly-declared legislative policy. It is one thing to depart from the words of a statute in order to permit it to accomplish its purpose; it is another and wholly different thing to depart from it where no policy is thereby advanced.

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[7] Application of the capital rate would in many instances, under facts similar to those in issue, affirmatively promote the legislative policy by stimulating profit-taking. While it is true that under Section 113 (a) (5), infra, only the accumulation in gain from the time of distribution is taxed, that accumulation, as pointed out in Brewster vs. Gage, p. 335, may in fact be greater than the accumulation from the time of the decedent's death, in which case it is evident that failure to apply the capital-gain rate would "freeze" the assets (New York Trust Co. vs. Commissioner (C. C. A. 2d), 68 F. (2d) 19, 20) at least as much as though the accumulation from the time of death were taxed. The Dibblee case, supra, is an example. There the value at death was greater than the value at distribution. 75 F. (2d) 618.

V.

The 1928 Amendment to the Basis Section Was Not Intended to and Did Not Change the "Capital Assets" Definition.

The decision below in effect holds, as it seems do also *Ogle vs. Helvering, supra; Dibblee vs. Commissioner, supra,* and the decision of the District Court in *First National Bank vs. United States,* 7 F. Supp. 915 (reversed *First National Bank vs. United States* (C. C. A. 1st), *supra*), that Section 113 (a) (5) was enacted for the purpose of fixing not only basis date but acquisition date. We submit that this is plainly not so, and that the contrary view violates the express language of that Section and is the result of a failure properly to recognize the occasion and purpose of the enactment.

In all Acts prior to the 1928 Act, the basis date in the case of inherited property was fixed as "time of acquisition." While Section 113 (a) (5) of the 1928 Act changed the basis date as to general legatees, there is nothing in the Act or in the Committee reports regarding the same to indicate any intention to declare that the new basis date should be regarded as the acquisition date. On the contrary, the language used in the new Section clearly indicates a recognition that the new basis date is a date other than the date of acquisition. This appears from the use of the phrase "time of distribution to the taxpayer" in the same sentence and in connection with the phrase "acquired either by will or by intestacy." When the use of these phrases in juxtaposition is considered in the light of the use in prior Acts of the phrase "time of acquisition," it becomes apparent that Congress purposely used the phrase "time of distribution" not as a synonym for but in contradistinction to the phrase

"time of acquisition." Had Congress intended to define "time of acquisition" for the purpose of such a case as this, it could easily have done so. In fact it is inconceivable, in view of the uniform administrative practice in treating a legatee as having "acquired and held" property from the date of death, that Congress would not have so defined "time of acquisition" had it intended to do so. The effect of the plain language of Section 113 (a) (5) is recognized by the Circuit Court of Appeals for the First Circuit in the *First National Bank* case, *supra*, as follows:

> It is significant, however, that even in paragraph (a) (5) of section 113 of the 1928 Revenue Act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides that "If personal property was acquired by specific bequest," etc., and "in all other cases if the property was *acquired either by will or by intestacy.*" (Italics supplied.)

Section 113 (a) (5) is in no way concerned with fixing the time of acquisition of property acquired by bequest or inheritance. It is concerned solely with the *manner* of its acquisition, and then only for the purpose of prescribing what dates should be used in determining basis for computing gain or loss upon subsequent disposition. The fact was that Congress in enacting Section 113 (a) (5) was purposely avoiding and leaving at large the question of time of acquisition, and it was doing so because that question in 1928 had not been passed on by this Court. In the revenue acts prior to that of 1928 the basis for determining gain or loss on property acquired by bequest or inheritance was prescribed as its market value at "the time of such acquisition."

Section 202 (a) (3) of the Revenue Act of 1921; Section 204 (a) (5) of the Revenue Acts of 1924 and 1926. What that time is was first considered by this Court in *Brewster vs. Gage,* but that case had not been decided when the Revenue Act of 1928 was under consideration, and to eliminate the resulting uncertainty Congress determined, in prescribing basis, to proceed without regard to when such property is in fact acquired and to prescribe basis without reference thereto. Section 113 (a) (5) was the result. See Senate Report No. 960, 70th Congress, 1st Session, p. 26. The provisions of that statute were continued as Section 113 (a) (5) of the Revenue Act of 1932, c. 509, 47 Stat. 169. In 1934, however, Congress reverted to the language of the 1926 and preceding Acts (see Section 113 (a) (5) of the Revenue Act of 1934, c. 277, 48 Stat. 683), and in respect thereof the Committees on Ways and Means and on Finance stated (House Report No. 704, 73rd Congress, 2d Session, p. 28; Senate Report No. 558, 73rd Congress, 2d Session, p. 35):

> Section 113 (a) (5) of the Revenue Act of 1932 is a re-enactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to meaning of the term "date of acquisition," which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster vs. Gage,* 280 U. S. 327). Section 113 (a) (5) of the bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal.

It is apparent, as Congress itself stated, that Section 113 (a)-(5) of the Revenue Act of 1928 has nothing whatever to do with the question of when property such as that here involved is in fact acquired. See *Beers vs. Commissioner*, 31 B. T. A. 117, 119-120, affirmed (C. C. A. 3d), 78 F. (2d) 447. The decisions referred to above overlook that circumstance, however, and the result is that in those cases the courts have taken a statute whose interpretation is not even in issue and which in no way solves or is directed to the problem of when inherited property is acquired, and have used it as an instrument in forcing out of another statute a construction which deprives the words of the latter, contrary to established principle (*Old Colony R. Co. vs. Commissioner*, 284 U. S. 552, 560), of their natural and popular import, and which in addition causes that other statute, again in opposition to settled rule (*Shaw vs. Merchants' National Bank*, 101 U. S. 557), to run counter to and in disregard of the actual common-law fact, which is that property acquired by bequest or inheritance is acquired at the time of decedent's death, and not at some later time.

A reading of these decisions unmistakably indicates that they are the result of the misconception of the scope of the majority decision in the *New York Trust Co.* case, which we have analyzed above. The Circuit Court of Appeals of the First Circuit, however, recognized that in holding that Sections 101 and 113 were not "wholly unrelated," this Court did not in the *New York Trust Co.* case hold that basis date and date of commencement of holding must necessarily in all cases be the same.[8] Hence, that Court found nothing in the *New York Trust Co.* case which modifies the ruling of *Brew-*

[8] The majority opinion in the New York Trust Co. case expressly concedes that the use of a basis date differing from the date of commencement of holding is "undoubtedly legally possible and within the power of Congress."

ster vs. Gage and nothing that is inconsistent with its language, found at pages 202-203:

> Section 101 and section 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.
>
> In other words, Congress intended only by the change in section 113 (a) (5) of the 1928 Revenue Act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the Administrative Bureau as to date of acquisition of such property. It, however, made no substantial change in section 101 of that act from the provisions of section 208 (a) (8) of the 1926 Revenue Act for determining what are capital assets.
>
> In view of the purpose, which has repeatedly been recognized both by the Administrative Bureau and the courts, of allowing a gain from the sale of property held for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the Revenue Acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the government in construing section 113 (a) (5) of the 1928 Revenue Act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for com-

puting gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by section 113 (a) (5) of the Revenue Act of 1928 to effect a change in the period during which property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in section 101 of that act.

The correctness of this position, even aside from all other considerations, is conclusively demonstrated when Section 101 (c) (8) is viewed in its entirety. The provision begins with the simple statement that "capital assets" means property held for more than two years. This statement, standing alone, obviously leaves for determination, according to the facts in each case, the question of when acquisition of the property involved occurred. Added to the statement, however, are three qualifying subdivisions—(A), (B), and (C). By these subdivisions, none of which is applicable here, it is provided in effect that in certain specified circumstances holding shall be deemed to have begun, not when the property was acquired, but at some other date, the date in each instance being the basis date.

The manifest effect of the decision below is to add to the three qualifying subdivisions a fourth covering the situation here in issue. The only justification advanced is that otherwise basis date and acquisition date would not coincide. The assumption is that Congress must have intended that they should be coincident.

The infirmity of the argument is that the assumption is without warrant. The fact is that by adding only three subdivisions Congress unequivocally indicated that, except as

therein expressly qualified, Congress did not intend that the commencement of the period of holding should be coincident with the basis date where the latter is fixed at a date other than the date of acquisition. The only reasonable and logical assumption is that if Congress had intended that in all cases these dates should be coincident it could easily and would have said so, instead of singling out the specific situations covered by the three subdivisions.

VI.

Subdivision (B) of Section 101 (c) (8) Is Not Applicable.

The Government argued below (R. 43; Br. 13-14) that petitioner's holding period is controlled by the provisions of subdivision (B) of Section 101 (c) (8), and that under these provisions petitioner's shares may not be treated as having been acquired at a date earlier than their basis date. The court overruled this manifestly erroneous contention. (R. 43-44.) However, the Second Circuit in the *Ogle* case and the *District Court* in the *First National Bank* case proceeded upon the assumption that subdivision (B) was applicable. For that reason we deal with the argument.

Subdivision (B) was neither designed to have nor has anything whatever to do with situations of the kind here in issue. The provision has application only to situations where a taxpayer has as his basis for determining gain or loss the basis of a prior owner, with the result that the taxpayer's basis date is earlier than his date of acquisition; in other words, it has to do with situations where the taxpayer's basis is a substituted one. Such a situation is that of a donee of a gift *inter vivos* consummated after December 31, 1920, which was what was involved in *Helvering vs. New York Trust Co.*, and it was to the position of such a donee, and to

that alone, that Section 101 (c) (8) (B) was intended to apply. Section 101 (c) (8) (B) was first enacted as part of Section 208 (a) (8) of the Revenue Act of 1926, and at that same time Congress made similar provisions, in the same subdivision, in respect of property acquired upon non-taxable corporate reorganizations; the latter provisions appear in the 1928 Act as Section 101 (c) (8) (A) and (C), *infra*. At the time of reporting the Revenue Bill of 1926 the Committee on Ways and Means stated (House Report No. 1, 69th Congress, 1st Session, pp. 6-7):

> The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years. Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact the question frequently arises as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The amendment proposed to this section incorporates in the law the present regulation of the Treasury and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gains and loss under this section. The same question arises in the case of property received by gift after December 31, 1920. The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section.

See also Senate Report No. 52, 69th Congress, 1st Session, p. 18. Obviously subdivision (B) has no more application here than have subdivisions (A) and (C), and the latter could be resorted to to reach a conclusion against the taxpayer with as much justification as can the former. In adding all three subdivisions to the section, Congress was dealing with situations where acquisition was later than the time of the controlling basis, and its purpose was to treat a taxpayer as though he had held from the earlier date in spite of the fact that he had held only from the later, and this because his basis was a substituted one. Congress was making provision for *adding* tenures; the District Court in the *First National Bank* case and the Second Circuit in the *Ogle* case proceed as though Congress was providing for *subtracting* or *dividing* tenures. There is not the slightest foundation, either in the words of the statute or in the reports of the committees or elsewhere, to support the latter view. As said by the court below (R. 44):

> * * * there is no place in [a situation like that at bar] * * * to employ a substituted extension to carry the "acquisition" of legal interest back to death. We think neither paragraph (B) nor any inference from it is of any aid here.

Aside from the fact that a case like the instant one does not involve successive ownerships, since the distributee's ownership, as decided by *Brewster vs. Gage*,[9] is continuous from the time of the decedent's death, and subdivision (B) is therefore not applicable, it does not follow, as the Com-

[9] The decision of the Circuit Court of Appeals of the Second Circuit in the Ogle case is directly contrary to this decision in refusing to recognize the possibility of simultaneous "holding" by the administrator and the next of kin. Such dual "holding" is a necessary concept under every Revenue Act, and is fundamental in the application of Section 168 of the 1928 Act.

missioner argued below (Br. 14), that because Congress intended that where successive ownerships exist they should be added, it also intended the converse, any more than it follows, because Congress taxes capital gains, that it therefore permits the deduction of capital losses, which is not the case. Section 117 (d) of the Revenue Act of 1934, c. 277, 48 Stat. 683. Instances could be multiplied of logical inconsistencies in the incidence of income taxes. But even if the assumption were logical, which is not true, it would nevertheless be untenable in the light of the historical development of the capital-gain provisions, and even in a tax case "logic must yield to history." *New York Trust Co. vs. Eisner*, 256 U. S. 345, 349; *Schuette vs. Bowers* (C. C. A. 2d), 40 F. (2d) 208, 213. The fact is that ever since the capital-gain provisions were first enacted there has been a steady widening of the concept of capital assets for the purpose of income taxation. In the 1921 Act the definition was limited to property held for profit or investment. Section 206 (a) (6) of the Revenue Act of 1921. In the revision of 1924 that restriction was removed and the definition made to apply to all kinds of property except stock in trade. Section 208 (a) (8) of the Revenue Act of 1924; Senate Report No. 398, 68th Congress, 1st Session, pp. 21-22. And in the Revenue Act of 1926, as we have already seen, the definition was further broadened so as to permit taxpayers to compute their holding periods by adding preceding tenures where the property was acquired by gift or in a non-taxable exchange. Thus the historical situation in 1928 was that every time Congress had changed the scope of the capital-asset definition the result was an enlargement. Under those circumstances "there is little likelihood that the law-makers meant to narrow the concept" (cf. *Burnet vs. Guggenheim*, 288 U. S. 280, 286-287), and that is particularly true here in view of the fact that

the provision which the Government argues was intended to restrict the concept was enacted at the very time Congress was engaged solely in broadening it. The Commissioner proceeds by assumption to convert an intention to enlarge into an intention to restrict, and, in addition, to do so in the face of a settled policy of enlargement. To that seems applicable what was said in *United States vs. Jefferson Elec. Mfg. Co.*, 291 U. S. 386, 396:

> As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown.

Here no different purpose is shown, either plainly or obscurely.

VII.

The Decision Below Makes for Inequality, Absurdity, and Discrimination.

It has long been established that in construing statutes interpretations are to be avoided which lead to absurdities, discriminations, and injustices. *Zellerbach Co. vs. Helvering*, 293 U. S. 172, 178. Yet that is what the Government's position does. Illustrations may be given.

No one has suggested, not even the Commissioner or the courts which have adopted his contentions, that Section 113 (a) (5) was at any time consciously designed by Congress to serve as a definition of capital assets or even as a part of such a definition. So far as here important, the only deliberate definition of capital-assets is that made in Section

101 (c) (8), together with the qualification thereof made in subdivision (B), assuming for the moment, contrary to the fact, that the latter is here applicable. This being true, the circumstance must not be lost sight of that Section 101 (c) (8) and subdivision (B) were not new in the 1928 Act. The former was enacted first in 1921, and the latter in 1926. Each of them, moreover, has been reenacted in each subsequent act in substantially identical language. In view of these considerations it would seem to follow, as a matter of ordinary and sensible construction, that what Congress was saying in one act it was also saying in the others, and that if its words would not fit a set of facts in one instance they would not fit that same set of facts in the others. Certainly "nothing but the * * * ingenuity * * * of an acute and powerful intellect would discover" a hidden meaning in one statement of words and not in another statement of the same identical words, and the law does not favor a construction requiring that degree of mental exertion. *Old Colony R. Co., supra*, 284 U. S. 552, 560. Yet that is what the Government is here contending; it is in effect saying that so far as facts like those here in issue are concerned, the language of Section 101 (c) (8) and of subdivision (B) means one thing *in the 1928 and 1932 Acts, and another thing* in the 1926 and 1934 Acts, in spite of the fact that in all the years the language of these provisions is in all substantial respects identical.

The absurdity is even more striking when the facts in this case are considered. If petitioner had sold his shares on November 1, 1927, it would not be doubted (the 1926 Act being then effective) that they would have constituted "property held by the taxpayer for more than two years." It so happened, however, that petitioner continued to hold the shares and did not dispose of them until May 28, 1928. The

result of that circumstance, the Government asks this Court to say, is that then petitioner held the property for less than two years—that, though he held them longer, his period of holding was shorter, and this in spite of the fact that the Revenue Act of 1928 did not change a syllable in the capital-asset definition as they were written in the 1926 Act.

Or suppose that distribution of the decedent's estate had been delayed until June 1, 1928, and that the sale of May 28, 1928, had been effected by the administrator. The gain, if distributed and taxable to petitioner, would have been taxable to him under Section 162 (b) at the rate applicable to capital gains. Section 168 of the Revenue Act of 1928. However, if distribution had been made a week earlier and petitioner, as in fact occurred, had himself sold the shares, the profit in that situation, the Government argues, should be taxed to petitioner as ordinary income.

If, as we have many times been admonished, we are to look upon and deal with taxation as would practical men, instead of hamstringing substantial facts by the use of technical refinements, the foregoing illustrations make obvious the fact that the Government's position is as unjustifiable from the point of view of substance as it is contrary to the language of the statutes. The inquiry is and should be directed to the question of when as a matter of substance and reality ownership and enrichment became the taxpayer's, not that of when, for purposes foreign to taxation, there might have been change in technical appearance. Petitioner in this case became enriched, not on January 28, 1927, when the probate court, as part of its duty in administering the estate, formally declared what everybody already knew, but on October 31, 1925, when A. T. Rand by his death gave what he owned to his heirs. It was then, if ever, that petitioner succeeded to ownership of the shares. He acquired them

then, and in consequence it was from that date that he held them. *Brewster vs. Gage, supra;* I. T. 1889, *supra.*

VIII.

The Decision Below Contravenes Established Principles of Construction.

In final analysis, all other matters aside, the most favorable view that can be taken of the Government's position is that it is an effort by construction to fill what it assumes to be an omission inadvertently left in the statute. There is no evidence justifying the assumption. But even if the contrary were true it would avail the Government nothing; for nowhere is there anything to indicate, either in the Congressional reports or elsewhere, that Congress, had its attention been directed to the omission assumed by the Government, would have filled it in the manner the Commissioner contends, and in that circumstance it is the duty of the courts to accept and apply the law as the law-maker has left it. It is not allowable to speculate what Congress might have done had it addressed itself to making specific provision for a case of this kind. In this respect what this Court said in *United States vs. Goldenberg,* 168 U. S. 95, 102-103; is applicable:

> The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons

> for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense (*Holy Trinity Church vs. U. S.*, 143 U. S. 457); it involves no injustice, oppression, or absurdity (*U. S. vs. Kirby*, 74 U. S. 7 Wall. 482; *McKee vs. U. S.*, 164 U. S. 287); there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. * * * Certainly there is nothing which imperatively requires the court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. * * *

The rule is more briefly stated in *Hobbs vs. McLean*, 117 U. S. 567, where this Court said:

> When a provision is left out of a statute, either by design or mistake of the Legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.

See also *Ebert vs. Poston*, 266 U. S. 548, 554.

That Congress in the 1928 Act intended to restrict the definition of capital assets, there is not even a probability; on the contrary, as noted above, the evidence is that the policy of Congress was to enlarge that definition. But even if there were warrant for assuming an intention to make a change, Congress either forgot or failed to make that intention effective, and the law is established that what Congress has left undone no one else may do for it. See *Hopkins vs. Commissioner, supra*, p. 13.

A final consideration is that this is a case wherein doubt, if any there be, must be resolved in favor of the taxpayer.[10] "The reduction of the rate of tax on capital gains," this Court declared in *Helvering vs. Bliss*, 293 U. S. 144, 151, was a liberalization of the law "in the taxpayer's favor," was "begotten from motives of public policy," and is "not to be narrowly construed." That declaration, were there room for doubt, should turn the issue in petitioner's favor.

---

[10] The Commissioner argued below (Br. 26) that "it is a matter of conjecture whether the operation of the statute as the Board construed it will operate generally to the advantage of the taxpayer or the Government. Market variations might in one case favor the taxpayer and in another favor the Government, irrespective of whether the time of distribution fixes the basis or not." This contention loses sight of the fact that use of the capital rate is optional with the taxpayer, and that he may be relied on to invoke it when it is to his advantage to do so.

The Second Circuit in New York Trust Co. vs. Helvering, 68 F. (2d) 19, made the statement (p. 20) that "it must be owned that [the capital-gain statute] * * * is a statute of exemption," and reiterated this thought in the Ogle case. We find it difficult to share this view. Some people, and governments too, think that capital gains should not be taxed at all; certainly they would not consider Section 101 a statute of exemption. It must be remembered also that capital gains represent only one side of the ledger; on the other are capital losses, which are subject to rigid limitations in respect of deductibility. The mere fact of a flat rate on capital gains obviously does not make the statute one of exemption; until the recent Revenue Act of 1935 corporate gains have always been taxed at a flat rate, in many years at the same rate as capital gains. See, for example, Section 208 (b) and Section 230 of the Revenue Act of 1926.

In any event, it seems that the question of construction is set at rest by the decision in Helvering vs. Bliss, supra.

CONCLUSION.

We are concerned with a situation squarely within concise statutory language. Disregard of that language on the one hand advances no legislative policy, and on the other penalizes the taxpayer. The language was designed to benefit the taxpayer, and for that purpose, this Court has said, should be liberally construed.

We submit that the decision below should be reversed.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Section 101 (a):

In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

Section 101 (a) (c) (8) (A) (B) and (C):

For the purposes of this title—

* * * * * * * * *

"Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the pur-

pose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

Section 168:

In the case of an estate or trust, or of a beneficiary of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the estate or trust, and shall be taxed to the beneficiary or to the estate or trust as provided in this Supplement, but

at the rates and in the manner provided in section 101 (a) and (b), relating to capital net gains and losses.

Section 113 (a) (5):

The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * * *

(5) If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

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No. 439

In the Supreme Court of the United States

October Term, 1936

RUFUS R. RAND, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

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MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case. The petition is based upon the same facts, involving identical issues, as *Ogle* v. *Helvering*, 77 F. (2d) 338 (C. C. A. 2d), now on petition for a writ of certiorari, No. 137, October Term, 1935, to which petition we made no opposition.

On May 28, 1928, petitioner sold 962⅔ shares of stock of the Minneapolis Gas Light Company for $439,261.05. (R. 33.)

These shares were distributed to him pursuant to a decree of distribution from the estate of Alonzo

T. Rand, who died intestate October 31, 1925. (R. 33–34.)

The shares had a fair market value of $169,419.33, as of the date of distribution, January 28, 1927, so that the profit realized from the sale was $269,-841.72. (R. 33.)

The petitioner reported this profit as a capital net gain taxable at the 12½ percent rate.

The Commissioner of Internal Revenue held that the profit was taxable at the ordinary rates. The sale was less than two years from the date of distribution of the stock. The Commissioner held that the date of distribution, rather than the date of the death of Alonzo T. Rand, controlled in determining whether the property had been "held by the taxpayer for more than two years" and whether there was a capital net gain.

If Commissioner's contention is correct, the deficiency in petitioner's income tax for the calendar year 1928 is $20,736.45 (R. 34); if incorrect, petitioner has made an overpayment of income tax for the calendar year 1928 in the amount of $13,-545.09. (R. 33.)

The Board of Tax Appeals sustained the Commissioner's holding that there was no capital net gain, and determined a deficiency of $20,736.45. (R. 17.) Its decision was affirmed by the court below.

While we think the conclusion reached below is correct, we do not feel that the petition should be opposed. The court below considered that its de-

cision was in conflict with the decisions of the Circuit Court of Appeals for the First Circuit in *First Nat. Bank of Boston* v. *United States*, 76 F. (2d) 200, and *Lee* v. *Commissioner*, 76 F. (2d) 203. The Government has filed petitions for writs of certiorari in those cases, Nos. 110 and 111, October term, 1935, alleging a conflict with the decision in the case of *Ogle* v. *Helvering, supra.* In those cases, the taxpayers were residuary legatees, whereas in this case, and in *Ogle* v. *Helvering*, the taxpayer took under intestacy laws; but the question presented in all four cases is whether personal property of a decedent passing otherwise than by specific bequest may be considered to have been held by the recipient during any period prior to actual distribution for the purpose of satisfying the two-year requirement of Section 101 (c) (8) of the Revenue Act of 1928.

Writ of certiorari was granted by the Court May 20, 1935, in the case of *Nancy K. McFeely* v. *Helvering*, No. 24, October Term, 1935. That case also presents the same general question, although the facts are different in that the taxpayer was the donee of a widow who had elected under the laws of Pennsylvania to take against the will of her deceased husband. The court in that case held that the date of distribution controlled. To the same effect is *Dibblee* v. *Commissioner*, 75 F. (2d) 617 (C. C. A. 9th), now pending on the taxpayer's petition for rehearing.

We believe that the question involved is of sufficient importance to justify the granting of the writ.

Respectfully submitted.

STANLEY REED,
Solicitor General.

SEPTEMBER 1935.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 12–16) is not reported. The opinion of the Circuit Court of Appeals (R. 38–46) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 19, 1935. (R. 46–47.) The petition for a writ of certiorari was filed September 12, 1935 (R. 48), and was granted October 14,

1935 (R. 48). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner on May 28, 1928, sold stock which he had received on January 28, 1927, upon a distribution of the estate of Alonzo T. Rand, who died intestate on October 31, 1925, Was the stock "held" by the petitioner for more than two years, so that the gain on the sale thereof is taxable as a "capital net gain" within the meaning of Section 101, Revenue Act of 1928?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*, pp. 8–14.

STATEMENT

The facts were found by the Board of Tax Appeals as stipulated by the parties and are substantially as follows (R. 13–15, 32–34):

On April 30, 1925, and prior thereto, the Minneapolis Gas Light Company had outstanding 16,000 shares of common stock of a par value of $50 each. On April 30, 1925, a stock dividend of 175 per cent was issued, and at all times thereafter there were outstanding 44,000 shares of common stock of the company of a par value of $50 each. On January 28, 1927, there were distributed to the petitioner, pursuant to a decree of distribution, 962⅔ shares

of such stock from the estate of Alonzo T. Rand, who died intestate on October 31, 1925.

On May 28, 1928, the petitioner sold the 962⅔ shares of Minneapolis Gas Light Company stock received from the estate of Alonzo T. Rand and received therefor $439,261.05 in cash. The basis of such stock for gain or loss, namely, the value thereof at the time of distribution to the petitioner, was $169,419.33. The taxable gain realized by petitioner upon the sale is $269,841.72.

Alonzo T. Rand, who died intestate October 31, 1925, left an estate of a total value of $2,104,748, consisting of personal property of a market value of $1,840,948, and real estate of a market value of $263,800. The personal property included cash of $223,814.73 and United States Government obligations of a market value of $145,829.60. During administration and prior to January 28, 1927, the date of distribution, the estate had cash receipts of $161,995.97. The total debts and obligations of the estate, paid or payable before and after January 28, 1927, were in the amount of $263,832.29.

Upon audit of the return of the petitioner for the taxable year 1928 the Commissioner made many adjustments and determined a deficiency in tax. The Commissioner determined that the stock sold by the petitioner on May 28, 1928, had been held by him only from the date of distribution, a period less than two years, and accordingly the gain thereon is taxable at the ordinary normal and surtax rates and not at the rates applicable to capital

gains. It was stipulated that if the gain on the sale of the stock is taxable at the rate applicable to capital gains under Section 101 of the Revenue Act of 1928, there is no deficiency, but an overpayment in tax of $13,545.09. It was further stipulated that if the gain on the sale is not a capital gain and not taxable at the rate provided in Section 101 of the Revenue Act of 1928, but at the normal and surtax rates prescribed by the Act, there is a deficiency in tax of $20,736.45.

ARGUMENT

The Circuit Court of Appeals, affirming the Board of Tax Appeals, held that the stock sold on May 28, 1928, was held by the petitioner, within the meaning of the statute, only from the date of distribution thereof to him from the decedent's estate, January 28, 1927, a period of less than two years, and accordingly the profit on the sale may not be taxed as a "capital net gain" but is taxable as ordinary net income. We submit that the decision below is correct.

Section 101 (c) (8) of the Revenue Act of 1928, c. 852, 45 Stat. 791, *infra,* provides that at the election of the taxpayer the tax on net gains from the sale of capital assets may be taxed at 12½ percent (instead of at the ordinary normal and surtax rates) and defines the term "capital assets" as "property *held by the taxpayer* for more than two years." (Italics supplied.) It is further provided that in determining the period for which the taxpayer has held property there shall be included

the period for which the property was held by any other person, if under Section 113 the basis for determining gain or loss on a sale of the property in the hands of the taxpayer is the same as it would have been in the hands of such other person. Subdivision (c) (8) (B), *infra*. Section 113 (a) of the Revenue Act of 1928, *infra*, so far as material here, provides that the basis for determining gain or loss on a sale of property *acquired* after February 28, 1913, shall be the cost thereof, with certain exceptions. Subdivision (a) (2) provides generally that if the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor. Under Subdivision (a) (5) the basis prescribed for real property acquired by general or specific devise or intestacy, and of personal property acquired by an estat[illegible] from the decedent, is the value thereof at the dat[illegible] decedent's death. In all other cases of property acquired either by will or intestacy, however, which include general or residuary bequests, the basis specified is the value of the property *at the time of the distribution to the taxpayer*.

The petitioner received the stock in question on January 28, 1927, upon a distribution of the estate of Alonzo T. Rand, deceased. The decedent died intestate October 31, 1925. Hence, the petitioner acquired the stock by intestacy and under the statute the basis for determining the gain on the sale thereof is the value of such stock at the date

of distribution. The petitioner, conceding that the time of distribution is the date for fixing the basis, contends that the stock was acquired at the date of the decedent's death and was held by him from that time, a period of more than two years before the date of sale. The respondent contends, and the court below held, that the date prescribed for fixing the basis also marks the beginning of the holding period for purposes of the capital gains provisions and accordingly the stock was acquired and held by the petitioner, within the meaning of the statute, only from the date of distribution, less than two years before the sale of the stock.

Thus the question here presented is essentially the same as that involved in *Nancy K. McFeely* v. *Helvering, Commissioner,* No. 24, October Term, 1935, pending on certiorari to the Circuit Court of Appeals for the Third Circuit, which is set for argument immediately preceding the instant case. In the *McFeely* case, the taxpayer, by virtue of a gift in 1925 from her mother of a portion of the latter's statutory interest in her deceased husband's estate, received certain stock in November, 1927, upon a distribution of the decedent's estate. The decedent died in June, 1919, making no provision in his will for his widow. The taxpayer sold the stock in March, 1929. The Circuit Court of Appeals for the Third Circuit, affirming the Board of Tax Appeals, held that the stock was "held" by the taxpayer only from the date of distribution and therefore for less than two years. The position and

contentions of the respondent herein are fully set forth under *Argument* in the brief on behalf of the respondent in the *McFeely* case. In the interest of brevity and to avoid needless repetition and lessen the burden of the Court, the contentions of the respondent are not repeated here, but the *Argument* in the brief for the respondent in the *McFeely* case is incorporated herein by reference.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

OCTOBER 1935.

APPENDIX

STATUTE AND OTHER AUTHORITIES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 815, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital gain.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which

the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property;

* * * * *

(2) Gift after December 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) Transfer in Trust after December 31, 1920.—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair

market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *.

Treasury Regulations 74:

ART. 596. *Property transmitted at death.*—In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

S. Rep. 960, 70th Cong., 1st Sess. (p. 26):

> Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequests or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

U. S. GOVERNMENT PRINTING OFFICE: 1968

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 494

ISABEL K. DIBBLEE, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 4, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 494

ISABEL K. DIBBLEE, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Docket No. 61036

APPEARANCES

For Taxpayer:

ALBERT J. DIBBLEE, Esq.

For Comm'r:

H. D. THOMAS, Esq.

DOCKET ENTRIES.

Transferred to Miss Matthews 1/15/34.

1931

Dec. 28—Petition received and filed. Taxpayer notified. (Fee paid).

" 28—Copy of petition served on General Counsel.

1932

Feb. 10—Answer filed by General Counsel.

" 15—Copy of answer served on taxpayer, assigned to Circuit Calendar.

Sept. 12—Motion for Circuit hearing at San Francisco filed by taxpayer.

1933

July 10—Notice of hearings at San Francisco, California, beginning 9/25/33.

Sept. 25—Hearing had at San Francisco before W. C. Lansdon, Div. 8. Submitted. Stip. facts filed. Briefs due Nov. 6, 1933—20 days for reply, if any.

1933

Nov. 1—Brief filed by taxpayer.

" 4—Motion for extension to Nov. 27, 1933 to file brief filed by General Counsel. 11/6/33 granted.

" 27—Motion for extension of 30 days to file Reply Brief filed by taxpayer. 11/28/33 granted.

" 27—Brief filed by General Counsel.

" 28—Copy of taxpayer's brief served on General Counsel.

Dec. 6—Order that petitioner be given thirty days after the filing of respondent's brief to file reply, entered.

" 18—Reply Brief filed by General Counsel.

" 22—Reply Brief filed by taxpayer. 12/26/33—copy served on General Counsel.

1934

Feb. 13—Opinion rendered Annabel Matthews, Div. 13. Judgment will be rendered for respondent.

" 16—Decision entered, H. F. Seawell, Div. 4.

May 8—Supersedeas bond in the amount of $5,000.00 approved and ordered filed.

" 8—Petition for review by U. S. Cir. Ct. of Ap. 9th Cir. with assignments of error filed by taxpayer.

" 8—Proof of service filed by taxpayer.

" 8—Praecipe filed. Proof of service thereon.

" 8—Affidavit of service of petition filed. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 61036

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above named petitioner hereby petitions for a redetermination of the alleged deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:E-1, EEW-60D), dated November 3, 1931, and as a basis for her proceeding alleges as follows:

1. The petitioner is an individual, to-wit, a married woman, residing on Upper Road, Town of Ross, County of Marin, State of California;

2. The notice of deficiency, a true copy of which is hereto attached marked Exhibit "A" and made a part hereof, was mailed to petitioner by respondent on or after the 3rd day of November, 1931;

3. The taxes in controversy are income taxes for the calendar year 1928 and, as computed by respondent, amounted to the sum of $1,690.30;

4. The determination of said tax set forth in said notice of deficiency is based upon the following errors, to-wit:

(a) Respondent erred in holding that the two year period contemplated by the "Capital Net Gain" provisions of Section 101 of the Revenue Act

of 1928 commenced to run from [2] the date of distribution to petitioner of certain stocks and bonds acquired by her by general bequest under the will of her deceased mother, and not from the date of death of her mother;

(b) Respondent erred in using the appraised value at the date of distribution to petitioner of said stocks and bonds above referred to as a basis for determining gain or loss upon the sale of said securities;

(5) The facts, upon which petitioner relies as the basis of this proceeding, are as follows:

(a) That petitioner is a citizen of the United States, and of the State of California, residing in the Town of Ross, in the County of Marin, in said state;

(b) That Harriett de Witt Kittle, the mother of petitioner, died on the 28th day of March, 1926, in the County of Marin, State of California, leaving a last will and testament, wherein and whereby said deceased, Harriett de Witt Kittle, did devise and bequeath all of her estate to her four children, to-wit, Allen I. Kittle, John C. Kittle, Lucia H. K. Sherman, and your petitioner, share and share alike;

(c) That said last will and testament was by order of the Superior Court of the State of California, in and for the County of Marin, duly and regularly admitted to probate on or about the 30th day of April, 1926, and thereafter, to-wit, on or about the 21st day of May, 1927, after proceedings duly and regularly taken and had in that behalf in

the matter of the estate of said deceased, a decree of final distribution was duly given, made and entered by said Superior Court wherein and whereby there was distributed to your petitioner, among other properties, those certain stocks and bonds particularly described in Exhibit "B", hereto attached and made a part hereof;

(d) That thereafter, subsequent to the 28th day of March, 1928, and during the calendar year 1928, petitioner sold said stocks and bonds and realized a net profit thereon over and above the value of said securities as of the 28th day of March, 1926, amounting to the sum of $27,730.94;

(e) That petitioner, in her individual income tax return for the calendar year 1928, returned said net profit as "Capital Net Gain" under the provisions of Section 101 of the Revenue Act of 1928;

(f) That respondent, in making his final determination of petitioner's income tax for the calendar year 1928, [3] computed the tax upon the net profits derived from the sale of said stocks and bonds as a tax upon "Ordinary Net Income" and not as a tax upon "Capital Net Gain";

(g) That respondent, in making his final determination of petitioner's income tax for the calendar year 1928, computed the net profits derived from the sale of said stocks and bonds by using as a cost basis thereof what he asserts to be the value as of the date of distribution to said petitioner.

WHEREFORE, petitioner prays that this Board may hear this proceeding and determine that there

is no deficiency in tax for which petitioner is liable for the taxable year 1928; and for such other and further relief as to this Board may seem meet and equitable.

ALBERT J. DIBBLEE
Attorney at Law
670 Mills Bldg., San Francisco, Cal.
GEO. E. H. SATCHELL, C.P.A.
369 Pine St., San Francisco, Cal.
Attorneys for Petitioner. [4]

State of California,
City and County of San Francisco.—ss.

Isabel K. Dibblee, being first duly sworn, deposes and says:

That she is the petitioner above named; that she read the foregoing petition and is familiar with the statements contained therein, and that the facts therein stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

ISABEL K. DIBBLEE

Subscribed and sworn to before me this 23rd day of December, 1931.

[Seal] MARIE FORMAN
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires: Jan. 9, 1933. [5]

EXHIBIT "A"

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal
Revenue
Address Reply to
Commissioner of Internal Revenue
And Refer to

Nov. 3, 1931

Mrs. Isabel K. Dibblee
Hill Road,
Ross, California.

Madam:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $1690.30, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any

deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. Wilmer,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870 [6]

STATEMENT

IT:AR:E-1
EEW-60D

In re: Mrs. Isabel K. Dibblee,
Hill Road,
Ross, California.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1928	$8,329.10	$6,638.80	$1,690.30

Reference is made to your income tax return for the year 1928, in connection with the report of the internal revenue agent in charge, San Francisco, California, covering an examination of your books of account and records for the year in question.

Reference is also made to a conference held in the office of the internal revenue agent on April 17, 1930, in connection with your protest of April 9, 1930.

The principal issue involved is whether or not tax should be computed at 12½% under the capital net gain provision on gain derived from sale of certain securities acquired by inheritance.

Stocks and bonds sold in 1928 were inherited by general bequest from your mother's estate. The personal property was distributed May 21, 1927.

In the computation of tax you used the appraised value of the securities in question at date of the death of your mother, March 28, 1926, for the purpose of establishing the two-year period required under the capital net gain provisions of section 101 of the Revenue Act of 1928.

It is held that in the case of personal property acquired by general bequest the two-year period contemplated by the capital net gain provisions of the Revenue Act of 1928, commences to run from the date of distribution. The findings of the revenue agent are, therefore, sustained.

Earned income credit has been determined in accordance with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of McLarry v. Commissioner (30 Fed. (2d) 789), that is, where husband and wife render separate income tax returns on the community basis, the wife may within [7] the limitations provided in section 209 (a) (3) of the Revenue Act of 1926 and section

31 (a) of the Revenue Act of 1928, treat as earned income one-half of the salaries, wages and other income of the husband which constitutes income received for personal services actually rendered by him.

Earned income has been increased from $5,000.00 to $16,130.70 and earned income credit increased from $22.50 to $167.61.

The changes in income are as follows:

Net income reported on return (not including capital net gain)		$38,454.61
Add:		
1. Ordinary income increased		28,408.61
Total ordinary income		$66,863.22
Capital net gain reported	$32,504.14	
Capital net gain corrected	4,773.70	4,773.70
Adjusted net income		$71,636.92

Computation of Tax

Adjusted net income	$71,636.92
Less:	
Capital net gain	4,773.70
Income subject to surtax	$66,863.22
Less:	
Dividends	13,425.80
Income subject to normal tax	$53,437.42

Normal tax at 1½% on $4,000.00		$ 60.00
Normal tax at 3% on $4000.00		120.00
Normal tax at 5% on $45,437.42		2,271.87
Surtax on $66,863.22		5,526.75
Tax at 12½% on capital net gain of $4,773.70		596.71
Total tax		$8,575.33
		[8]
Brought forward		$ 8,575.33
Less:		
Earned income credit	$167.61	
Tax paid at source	78.62	246.23
Tax liability		$ 8,329.10
Tax assessed		6,638.80
Deficiency in tax		$ 1,690.30

Computation of Earned Income Credit

Earned net income	$16,130.70
Personal exemption claimed by husband	None
Normal tax at 1½% on $4000.00	$ 60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $8,130.70	406.53
Surtax on $16,130.70	83.92
Total tax	$ 670.45
Credit of 25%	$ 167.61

Explanation of Changes

See explanation above.

You are advised that a copy of this communication has been transmitted to your attorney, Mr. Whitney B. Sanders, 351 California Street, San Francisco, California, who has on file in this office a duly authorized power of attorney. [9]

EXHIBIT "B"

SECURITIES RECEIVED BY PETITIONER FROM THE ESTATE OF HARRIETT de WITT KITTLE, DECEASED, AND SOLD DURING THE CALENDAR YEAR 1928 SUBSEQUENT TO MARCH 28, 1928.

Date of Sale	Description of Securities	Appraised Value at date of death March 28, 1926	Respondent's asserted appraised value at date of distribution May 21, 1927
1928			
Apr. 18	13 shs. Nor. Pac. Ry. Co.	$ 871.00	$ 1160.25
" 18	85 shs. Western Pac. Ry. Co. Pfd.	6715.00	4930.00
" 24	7.5M Key System 5%	6138.90	4621.88
" 26	100 shs. Wickwire Spencer	159.00	66.25
" 28	L. A. Ry. Co. 5% (1 M)	862.50	950.00
" 27	So. Calif. Edison Co. 7% Pfd. (20 shs.)	492.50	570.00
" 27	25 shs. L. A. Gas & E. Co. Pfd.	2412.50	2500.00
" 27	100 shs. Pac. Gas & El. Pfd.	2459.37	2600.00
" 28	25 shs. San Joaquin L & P Co. Pfd.	2600.00	2625.00
" 28	1M So. Counties Gas Co. 5½%	1000.00	1000.00
" 30	3.8M Natomas Co. 6%	2280.00	1486.75
May 7	63 shs. Hawaii Cons. Ry. Pfd.	504.00	504.00
June 20	25 shs. Petaluma & Santa Rosa Ry. Pfd.	2000.00	2000.00
" 20	19 shs. Ditto Com.	570.00	570.00
Dec. 18	10 shs. Std. Oil Co. of Cal.	540.00	533.75
Apr. 18	100 shs. Pacific Ltg. Co.	3321.10	3780.66
" 27	200 " " " "	6642.20	7561.32
May 27	200 " " " "	6642.20	7561.32
May 8	100 " " " "	3321.10	3780.66
Dec. 28	125 " Shell Co. rights	605.63	577.10
	Total	50137.00	49378.94

[Endorsed]: United States Board of Tax Appeals. Filed Dec. 28, 1931. [10]

[Title of Court and Cause.]

ANSWER.

Now comes the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition of this taxpayer admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3.

4-(a) and (b). Denies that the Commissioner erred as stated in subparagraphs (a) and (b) of paragraph 4.

5-(a). Admits the allegations contained in paragraph 5-(a).

5-(b) to (e), inclusive. Denies the allegations contained in subparagraphs (b) to (e), inclusive, of paragraph 5.

5-(f). Admits that respondent, in making his final determination of petitioner's income tax for the calendar year 1928, computed the tax upon the net profits derived from the sale of certain stocks and bonds as a tax upon "Ordinary Net Income" and not as a tax upon "Capital Net Gain."

5-(g). Admits that respondent, in making his final determination of petitioner's income tax for the calendar year 1928, computed the [11] net profits derived from the sale of certain stocks and bonds by using as a basis thereof the value of said stocks and bonds as of the date of distribution to the petitioner. Denies all other material allegations contained in subparagraph (g) of paragraph 5.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
R. P. HERTZOG,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed Feb. 10, 1932. [12]

[Title of Court and Cause.]

STIPULATION AS TO FACTS.

It is hereby stipulated by and between Isabel K. Dibblee, petitioner above named, and the Commissioner of Internal Revenue, respondent above

named, by their respective attorneys of record, that the above entitled appeal shall be heard and determined by the said United States Board of Tax Appeals upon the following agreed statement of facts, to-wit:

1. That Isabel K. Dibblee, the petitioner herein, at all times hereinafter mentioned was, and now is, a married woman, a citizen of the United States and of the State of California, and a resident of and domiciled in the Town of Ross, County of Marin, State of California.

2. That Harriette deWitt Kittle was the mother of petitioner; that said Harriette deWitt Kittle was, at the time of her death, and many years prior thereto, a citizen of the United States and of the State of California, and a resident of, and domiciled in the Town of Ross, County of Marin, State of California.

3. That the said Harriette deWitt Kittle died on the 28th day of March, 1926, in the County of Marin, State of California, leaving a last will and testament bearing date the 3rd day of February, 1907, wherein and whereby said testatrix left all of her estate of every kind and nature whatsoever, and wheresoever situate, to her four children, to-wit, Lucia Hamilton Kittle Sherman, Isabel Kittle Dibblee, petitioner herein, Allen Irving Kittle, and John Casper Kittle, share and share alike; a copy of said will, marked Exhibit A, is attached hereto and made a part hereof.

4. That on the 30th day of April, 1926, after proceedings duly and regularly taken and had in that behalf in [13] the matter of the estate of said Harriette deWitt Kittle, deceased, in the Superior Court of the State of California, in and for the County of Marin, said last will and testament of said deceased was duly and regularly admitted to probate by orde of said Superior Court.

5. That thereafter said legatees and devisees under said will of said Harriette deWitt Kittle, deceased, to whom was devised and bequeathed by said will the whole of the estate of said deceased, share and share alike, as aforesaid, did enter into a written agreement bearing date the 19th day of May, 1927, wherein and whereby said legatees and devisees did mutually agree upon a division among themselves of certain shares of stock of domestic corporations and rights to acquire stock thereof, which constituted a part of the assets of said estate, in order to effect a partition and segregation of their respective undivided one-fourth interests in and to said shares of stock and rights to acquire shares, and did consent to the distribution to each of them, respectively, of the number of said shares of stock and rights to which each of them, respectively, were entitled pursuant to said division and partition. A copy of said agreement, marked Exhibit B, is attached hereto, and made a part hereof.

6. That thereafter, to wit, on the 21st day of May, 1927, after proceedings duly and regularly

taken and had in that behalf in the matter of the estate of said Harriette deWitt Kittle, deceased, a decree of final distribution in the matter of said estate was duly given, made and entered by said Superior Court, wherein and whereby there was distributed to each of said legatees and devisees, individually, to wit, Lucia H. K. Sherman, Isabel K. Dibblee, petitioner herein, Allen I. Kittle and John C. Kittle, the number of shares of stock of domestic corporations and rights to acquire shares of stock thereof, pursuant to the provisions of said agreement of May 19, 1927, hereinabove in paragraph 5 hereof referred to, and all of the remainder of said estate, including certain bonds of domestic corporations, hereinafter in paragraph 7 hereof referred to, to said legatees and devisees, share and share alike, to wit, an equal one-fourth thereof to each of said legatees and devisees. A copy of said decree, (omitting real estate descriptions), marked Exhibit C, is attached hereto and made a part hereof.

7. That thereafter, to wit, on the 26th day of May, 1927, said legatees and devisees, to wit, Lucia H. K. Sherman, Isabel K. Dibblee, petitioner herein, Allen I. Kittle and John C. Kittle, entered into a written agreement bearing date on said day, wherein and whereby they did mutually agree upon a division and partition of the bonds of domestic corporations so distributed to them, share and share alike, to-wit, an [14] undivided one-fourth thereof to each of said legatees and devisees in and by said decree of final distribution, as hereinabove in paragraph 6 hereof set forth, and pursuant to the

terms and provisions of said division and partition of May 26, 1927, petitioner herein did receive one-fourth of all of said bonds. A copy of said agreement, marked Exhibit D, is attached hereto and made a part hereof.

8. That thereafter and during the year 1928, petitioner sold certain of the bonds and shares of stock of domestic corporations acquired by her under and by virtue of the provisions of said will of said Harriette deWitt Kittle, deceased, as hereinabove set forth, which said securities so sold by petitioner, as aforesaid, are hereinafter in paragraph 9 hereof particularly described.

9. That the amounts and descriptions of said bonds and stocks referred to in paragraph 8 hereof, the fair market value thereof at the time of death of said Harriette deWitt Kittle, deceased, the fair market value of the property at the time of distribution to the petitioner, and the date upon which petitioner sold said bonds and stocks, are as follows, to wit:

Amount	Description	Value at time of Death	Value at time of Distribution	Date of Sale
13 shrs.	Northern Pacific Railway Co.	$ 871.00	$1,160.25	4-18-28
85 do	Western Pac. Ry. Co. Pfd.	6,715.00	4,930.00	4-18-28
100 do	Wickwire Spencer Co.	159.00	66.25	4-26-28
20 do	So. Cal. Edison Co. 7% Pfd.	492.50	570.00	4-27-28
25 do	Los Angeles Gas & Elec. Co. Pfd.	2,412.50	2,500.00	4-27-28
100 do	Pac. Gas & Elec. Co. Pfd.	2,459.37	2,600.00	4-27-28
25 do	San Joaquin Lt. & Power Co. Pfd.	2,600.00	2,625.00	5-28-28
63 do	Hawaii Cons. Ry. Pfd.	504.00	504.00	6- 7-28
25 do	Petaluma & Santa Rosa Ry. Co. Pfd.	2,000.00	2,000.00	6-20-28
19 do	Petaluma & Santa Rosa Ry. Co. Com.	570.00	570.00	6-20-28
10 do	Standard Oil Co. of Calif.	540.00	533.75	12-18-28
100 do	Pacific Lighting Co.	3,321.10	3,780.66	4-18-28
200 do	Pacific Lighting Co.	6,642.20	7,561.32	4-27-28
100 do	Pacific Lighting Co.	3,321.10	3,780.66	5- 8-28
200 do	Pacific Lighting Co.	6,642.20	7,561.32	5-27-28
7.5M par val.	Key System 5% Bonds	6,138.90	4,621.88	4-24-28
1M do	Los Angeles Ry. Co. 5% Bonds	862.50	950.00	4-28-28
3.8M do	Natomas Co. 6% Bonds	2,280.00	1,486.75	4-30-28
1M do	So. Counties Gas Co. 5½% Bonds	1,000.00	1,000.00	4-28-28
	Totals	$49,531.37	$48,801.84	

10. That all of the aforesaid bonds and stocks were sold by petitioner more than two (2) years after the death of [15] her said mother, Harriette deWitt Kittle, to wit, after March 28, 1926, and less than two (2) years after the time of distribution to the petitioner, for the sum of $77,243.70.

11. On her return for the taxable year 1928, petitioner reported as capital net gain a profit on the sale of said securities, particularly described in paragraph 9 hereof, of $27,712.33, based on the value of said securities as of March 28, 1926, the date of the death of said testatrix. That the profit on the sale of said securities, based on the fair market value thereof at the time of distribution, is $28,-441.86. In the notice of deficiency respondent has included said amount of $28,441.86 as ordinary income and has computed the tax on same accordingly. A copy of said notice of deficiency, marked Exhibit E. is attached hereto and made a part hereof.

Dated: September 18, 1933.

Attorneys for Petitioner

ALBERT J. DIBBLEE,
Attorney at Law,
670 Mills Bldg., San Francisco, Cal.

GEO. E. H. SATCHELL, C. P. A.,
369 Pine Street, San Francisco, Cal.

Attorney for Respondent

(Sd.) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue. [16]

EXHIBIT A.

I, Harriette deWitt Kittle of Ross, Marin County, California, make this my last will and testament. I hereby revoke all former wills made by me.

All my property, real, personal and mixed, of any kind and nature whatsoever, and wheresoever situate, I give unto my four children, Lucia Hamil-

ton Kittle Sherman, Isabel Kittle Dibblee, Allen Irving Kittle, John Casper Kittle, share and share alike. I make my sons, the said Allen Irving Kittle and John Casper Kittle, executors of this will, and desire that no bond be required of them or of either of them for the performance of any duty as such executors.

I give to said executors and to which onescever may act, full power and authority to sell or lease any of the property of my estate without first applying to the court for any order so to do.

Witness my hand this third day of February, nineteen hundred and seven.

HARRIETTE deWITT KITTLE.

[Endorsed]: Filed Apr. 10, 1926.

ROB E. GRAHAM, Clerk.

By Geo. S. Jones, Deputy. [17]

EXHIBIT B.

In the Superior Court of the State of California, in and for the County of Marin.

No. 3427

In the Matter of the Estate of
Harriette deWitt Kittle,

Deceased.

CONSENT TO DISTRIBUTION OF CERTAIN STOCKS.

We, the undersigned, legatees and devisees under the will of Harriette DeWitt Kittle, deceased, to

whom was given by said will the estate of said decedent, share and share alike, in order to effect a distribution of the shares of stock in corporations, have agreed to the division and distribution by the Decree of Distribution herein of shares of stock as follows, and do hereby assign and transfer our interests therein so that such division and distribution may be made, to-wit:

300 shares of stock in California Packing Corporation.

75 shares to Lucia H. K. Sherman.
75 shares to Isabel K. Dibblee.
75 shares to Allen I. Kittle.
75 shares to John C. Kittle.

36 shares of stock in The North American Company, common.

9 shares to Lucia H. K. Sherman.
9 shares to Isabel K. Dibblee.
9 shares to Allen I. Kittle.
9 shares to John C. Kittle.

100 shares of stock, preferred, in Petaluma and Santa Rosa Railway Company.

25 shares to Lucia H. K. Sherman.
25 shares to Isabel K. Dibblee.
25 shares to Allen I. Kittle.
25 shares to John C. Kittle.

77 shares of stock, common, in Petaluma and Santa Rosa Railway Company.

19 shares to Lucia H. K. Sherman.
19 shares to Isabel K. Dibblee.
20 shares to Allen I. Kittle.
19 shares to John C. Kittle. [18]

105 shares of preferred stock in Western Power Corporation.

26 shares to Lucia H. K. Sherman.
26 shares to Isabel K. Dibblee.
26 shares to Allen I. Kittle.
27 shares to John C. Kittle.

90 shares of stock in The Morris Plan Company of San Francisco.

22 shares to Lucia H. K. Sherman.
23 shares to Isabel K. Dibblee.
22 shares to Allen I. Kittle.
23 shares to John C. Kittle.

50 shares of stock in the Northern Pacific Railway Company.

12 shares to Lucia H. K. Sherman.
13 shares to Isabel K. Dibblee.
13 shares to Allen I. Kittle.
12 shares to John C. Kittle.

(Evidenced by certificate of deposit No. F-13793 for 50 shares of the capital stock of the Northern Pacific Railway Company, deposited pursuant to agreement dated February 7, 1927.)

50 shares of stock in the Goodyear Tire & Rubber Company of California, preferred.

13 shares to Lucia H. K. Sherman.
12 shares to Isabel K. Dibblee.
12 shares to Allen I. Kittle.
13 shares to John C. Kittle.

20 shares of stock in the Herald Realty Company.
5 shares to Lucia H. K. Sherman.
5 shares to Isabel K. Dibblee.
5 shares to Allen I. Kittle.
5 shares to John C. Kittle.

20 shares of stock in the Sheldon Townsite and Realty Company.
5 shares to Lucia H. K. Sherman.
5 shares to Isabel K. Dibblee.
5 shares to Allen I. Kittle.
5 shares to John C. Kittle.

70 shares of stock in The Bank of California, National Association.
17 shares to Lucia H. K. Sherman.
17 shares to Isabel K. Dibblee.
18 shares to Allen I. Kittle.
18 shares to John C. Kittle.

121 shares of preferred stock in the Natomas Company of California.
30 shares to Lucia H. K. Sherman.
31 shares to Isabel K. Dibblee.
30 shares to Allen I. Kittle.
30 shares to John C. Kittle. [19]

300 shares of common stock in The Western Pacific Railroad Corporation.
75 shares to Lucia H. K. Sherman.
75 shares to Isabel K. Dibblee.
75 shares to Allen I. Kittle.
75 shares to John C. Kittle.

300 shares of stock in the Union Oil Company of California.

75 shares to Lucia H. K. Sherman.
75 shares to Isabel K. Dibblee.
75 shares to Allen I. Kittle.
75 shares to John C. Kittle.

Certificates representing preferred and common stock for $2,500.00 each, in the Russ Building Company, to Lucia H. K. Sherman, Isabel K. Dibblee, Allen I. Kittle and John C. Kittle.

600 shares of stock in Bankers' Investment Company.

150 shares to Lucia H. K. Sherman.
150 shares to Isabel K. Dibblee.
150 shares to Allen I. Kittle.
150 shares to John C. Kittle.

150 shares of stock in Wells Fargo Bank & Union Trust Co.

37 shares to Lucia H. K. Sherman.
38 shares to Isabel K. Dibblee.
38 shares to Allen I. Kittle.
37 shares to John C. Kittle.

100 shares of stock in Pacific Gas and Electric Company.

25 shares to Lucia H. K. Sherman.
25 shares to Isabel K. Dibblee.
25 shares to Allen I. Kittle.
25 shares to John C. Kittle.

50 shares of stock in Sherman Clay & Co.
- 12 shares to Lucia H. K. Sherman.
- 13 shares to Isabel K. Dibblee.
- 13 shares to Allen I. Kittle.
- 12 shares to John C. Kittle.

100 shares of common stock of The Atchison, Topeka and Santa Fe Railway Company.
- 25 shares to Lucia H. K. Sherman.
- 25 shares to Isabel K. Dibblee.
- 25 shares to Allen I. Kittle.
- 25 shares to John C. Kittle. [20]

50 shares of preferred stock in the Great Western Power Company of California.
- 12 shares to Lucia H. K. Sherman.
- 12 shares to Isabel K. Dibblee.
- 12 shares to Allen I. Kittle.
- 14 shares to John C. Kittle.

500 shares of common stock in the Shell Union Oil Corporation.
- 125 shares to Lucia H. K. Sherman.
- 125 shares to Isabel K. Dibblee.
- 125 shares to Allen I. Kittle.
- 125 shares to John C. Kittle.

100 shares of prior preferred stock in San Joaquin Light and Power Corporation.
- 25 shares to Lucia H. K. Sherman.
- 25 shares to Isabel K. Dibblee.
- 25 shares to Allen I. Kittle.
- 25 shares to John C. Kittle.

608 shares of common stock in Pacific Gas and Electric Company. (New stock)
152 shares to Lucia H. K. Sherman.
152 shares to Isabel K. Dibblee.
152 shares to Allen I. Kittle.
152 shares to John C. Kittle.

100 shares of preferred stock in Los Angeles Gas and Electric Corporation.
25 shares to Lucia H. K. Sherman.
25 shares to Isabel K. Dibblee.
25 shares to Allen I. Kittle.
25 shares to John C. Kittle.

30 shares of prior preferred cumulative stock in Key System Transit Company.
7 shares to Lucia H. K. Sherman.
7 shares to Isabel K. Dibblee.
7 shares to Allen I. Kittle.
9 shares to John C. Kittle.

30 shares of preferred stock in Key System Transit Company.
8 shares to Lucia H. K. Sherman.
7 shares to Isabel K. Dibblee.
7 shares to Allen I. Kittle.
8 shares to John C. Kittle.

20 shares preferred stock in Southern California Edison Company.
5 shares to Lucia H. K. Sherman.
5 shares to Isabel K. Dibblee.
5 shares to Allen I. Kittle.
5 shares to John C. Kittle. [21]

800 shares of common stock in Southern California Edison Company. (New stock)
200 shares to Lucia H. K. Sherman.
200 shares to Isabel K. Dibblee.
200 shares to Allen I. Kittle.
200 shares to John C. Kittle.

Right to subscribe for and purchase 16 shares each of Southern California Edison Company common stock, to Lucia H. K. Sherman, Allen I. Kittle and John C. Kittle.

Right to subscribe for and purchase 18-8/12ths shares of common stock of Southern California Edison Company, to Isabel K. Dibblee.

425 shares of common stock in the Wickwire Spencer Steel Company.
106 shares to Lucia H. K. Sherman.
106 shares to Isabel K. Dibblee.
107 shares to Allen I. Kittle.
106 shares to John C. Kittle.

25 shares of preferred stock in The Pacific Telephone and Telegraph Company.
6 shares to Lucia H. K. Sherman.
6 shares to Isabel K. Dibblee.
7 shares to Allen I. Kittle.
6 shares to John C. Kittle.

10 shares of the common stock of the Pacific Telephone and Telegraph Company.
3 shares to Lucia H. K. Sherman.
3 shares to Isabel K. Dibblee.
2 shares to John C. Kittle.
2 shares to Allen I. Kittle.

255 shares first class 7% preferred stock of Hawaii Consolidated Railway Limited.
63 shares to Lucia H. K. Sherman.
63 shares to Isabel K. Dibblee.
64 shares to John C. Kittle.
65 shares to Allen I. Kittle.

342 shares of preferred stock in The Western Pacific Railroad Corporation.
86 shares to Lucia H. K. Sherman.
85 shares to Isabel K. Dibblee.
86 shares to Allen I. Kittle.
85 shares to John C. Kittle.

31 shares preferred stock of California Electric Generating Company.
8 shares to Lucia H. K. Sherman.
9 shares to Isabel K. Dibblee.
7 shares to Allen I. Kittle.
7 shares to John C. Kittle. [22]

662 shares of stock in Standard Oil Company of California.
166 shares to Lucia H. K. Sherman.
166 shares to Isabel K. Dibblee.
165 shares to Allen I. Kittle.
165 shares to John C. Kittle.

200 shares of common stock of General Cigar Co.
50 shares to Lucia H. K. Sherman.
50 shares to Isabel K. Dibblee.
50 shares to Allen I. Kittle.
50 shares to John C. Kittle.

269 shares of common stock of Pacific Lighting Corporation.

68 shares to Lucia H. K. Sherman.

67 shares to Isabel K. Dibblee.

67 shares to Allen I. Kittle.

67 shares to John C. Kittle.

50 shares of Kennedy Mining and Milling Company.

12 shares to Lucia H. K. Sherman.

13 shares to Isabel K. Dibblee.

13 shares to Allen I. Kittle.

12 shares to John C. Kittle.

50 shares of stock in California Market Properties Company.

13 shares to Lucia H. K. Sherman.

12 shares to Isabel K. Dibblee.

12 shares to Allen I. Kittle.

13 shares to John C. Kittle.

Dated: May 19, 1927.

Allen I. Kittle,
Isabel K. Dibblee,
John C. Kittle,
Lucia H. K. Sherman.[23]

EXHIBIT C.

In the Superior Court of the State of California,
In and for the County of Marin.

No. 3427

In the Matter of the Estate of
Harriette deWitt Kittle,
Deceased.

ORDER SETTLING FIRST AND FINAL ACCOUNT AND DECREE OF DISTRIBUTION.

The First and Final Account and Report accompanying same, of Allen I. Kittle and John C. Kittle, executors of the last will and testament of Harriette deWitt Kittle, deceased, together with the Petition for Distribution of said executors heretofore filed herein, coming on this day regularly to be heard, and it appearing to the satisfaction of this Court, and the Court hereby finding that due notice of the settlement of said Account and of the hearing of said Petition for Distribution and of said report, has been given in all respects as required by law, and evidence oral and documentary having been introduced, and the same having been considered, and it further appearing to the satisfaction of the Court and the Court hereby finding that all and singular the allegations of said Report and Petition for Distribution are true;

And the Court further finding that since the filing of said Account there has been received by said ex-

ecutors the sum of $1,926.00, and that there has been disbursed by said executors the sum of $63.24; that all inheritance, state, county, municipal and federal taxes due and payable by said estate have been paid; that all debts payable by said estate have been paid; that all expenses of administration incurred to date have been paid; save commissions payable to said executors and the fee to their attorneys incurred as in said First and Final Account set forth, and that said executors are entitled to receive commissions as such executors in the sum of Fourteen Thousand Two Hundred Sixty-four and 45/100ths Dollars ($14,264.45), and that a similar sum should be paid to their attorneys for services in and about the administration of said estate, and that the sum of $500, Five Hundred Dollars, is a reasonable sum to be allowed as expenses incident to the closing of the administration of said estate; [24]

And it further appearing that written consent to the allowance of said First and Final Account executed by all the legatees and devisees under the will of said decedent has been given and filed herein;

And it further appearing and the Court hereby finding that by the will of said decedent Lucia Hamilton Kittle Sherman, Isabel K. Dibblee, Allen I. Kittle and John C. Kittle have been given the property of said estate share and share alike, and that as to certain shares of stock the said legatees and devisees have agreed upon distribution thereof, and have made assignments to effect the same;

And it further appearing that said estate is now in condition to be finally distributed unto the persons thereto entitled, and the administration thereof brought to a close;-

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said First and Final Account of said Allen I. Kittle and John C. Kittle, executors of the last will and testament of Harriette deWitt Kittle, deceased, be and the same is hereby settled, allowed and approved as filed; that the said executors be and they hereby are authorized to retain the sum of Fourteen Thousand Two Hundred Sixty-four and 45/100ths Dollars ($14,-264.45); as and for their commissions as executors herein, and that they are hereby further authorized, ordered and directed to pay to their attorneys, Messrs. Myrick & Deering and Scott the sum of Fourteen Thousand, Two Hundred Sixty-four and 45/100ths Dollars, ($14,264.45), as and for their fee as attorneys for said executors in the administration of said estate;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sum of Five Hundred (500) Dollars be and the same is hereby allowed to said executors as a reasonable sum to meet expenses incident to closing the administration of said estate;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that there be and is hereby distributed to LUCIA H. K. SHERMAN, ISABEL K. DIBBLEE, ALLEN I. KITTLE and

JOHN C. KITTLE the following described real and personal property, share and share alike, that is, an equal one-fourth thereof to each, to wit:

Money, ... $ none

All personal property in the residence and on the property situate at Ross, Marin County, California, more particularly described in the Inventory and Appraisement on file herein, save and except the Pierce Arrow automobile heretofore sold.

REAL ESTATE.

All that certain real property, situated in the City and County of San Francisco, State of California, and described as follows, to wit:

(Here follows description of 16 parcels of real estate.) [25]

BONDS.

30 Key System Transit Company General and Refunding Mortgage Gold Bonds, $1,000.00, 5%, Series 1, due July 1, 1938.
Numbered M-569 to M-598, both inclusive.

10 $1,000.00 School Bonds of Patterson School District, Stanislaus County, California, 5% Gold Bond.

Numbered 25	Due March 11, 1938.
26 and 27,	Due March 11, 1939.
28 and 29,	Due March 11, 1940.
30 and 31,	Due March 11, 1941.
32 and 33,	Due March 11, 1942.
35	Due March 11, 1943.

5 Northwestern Electric Company, $1,000.00, 6% First Mortgage Twenty Year Sinking Fund Gold Bond, due May, 1935.
Numbered M-2964 to M-2968, inclusive.

12 City of Sao Paulo, State of Sao Paulo, Brazil, $1,000.00 6% External Secured Sinking Fund Gold Bond, principal payable November 1, 1943.
Numbered 7548 to 7559, inclusive.

10 State of Sao Paulo, Brazil, $1,000.00 Twenty-five year 8% Secured Sinking Fund Gold Bond, External Loan of 1925, due January 1, 1950.
Numbered 6473 to 6482, inclusive.

10 Reno Light, Power and Water Company, $1,000.00 6% Mortgage Sinking Fund Forty Year Gold Bond, principal due July 1, 1944.
Numbered 1 to 10 inclusive.

6 Southern Counties Gas Company of California, $1,000.00 5½% First Mortgage Twenty Year Sinking Fund Gold Bond, principal due May 1, 1936.
Numbered M-1755 to M-1760, inclusive.

9 Petaluma and Santa Rosa Railroad Company, $1,000.00 First Mortgage 5½% Twenty-five Year Sinking Fund Gold Bond, due September 1, 1943.
Numbered 110 to 112, inclusive, 205 to 209 inclusive; and 665.

17 Pacific Electric Railway Company, $1,000.00, 5% First Mortgage Gold Bond, due January 1, 1942.
Numbered 203 to 212, inclusive; 1155, 1307, 1308, 3028, 3081, 3082, 4404.

1 Post Street Investment Company, fifteen year note, $100.00, 6%, principal due April 1, 1938.
Numbered C-411. [26]

25 Great Western Power Company, $1,000.00 first mortgage, 5% Sinking Fund Forty Year Gold Bond, due July 1, 1946.
Numbered 12439 to 12453, inclusive, 5778, 2959, 7661, 14367, 20150, 20152, 20153, 20154, 16571, 20151.

10 Northern New York Power Corporation, First Mortgage, 6%, $1,000.00 Gold Bonds, principal due January 1, 1933.
Numbered 511 to 520, inclusive.

1 Wickwire Spencer Steel Company Five Year 7% Class A Note, $1,000.00, principal due February 25, 1930.

12 Natomas Company of California General and Refunding Mortgage 6% Twenty Year Gold Bonds, $1,000.00, due January 1, 1935.
Numbered M-7635 to M-7646, inclusive.

2 Natomas Company of California General and Refunding Mortgage 6% Twenty Year Gold Bond, $500.00, due January 1, 1935.
Numbered D-1012 and D-1228.

23 Natomas Company of California General and Refunding Mortgage 6% Twenty Year Gold Bonds, $100.00, due January 1, 1935.
Numbered C-3087, C-3088, C-3089, C-3090, C-4984, C-4985, C-5550, C-5551, C-5552, C-5553, C-6963, C-6964, C-6965, C-6966, C-10811, C-10812, C-10813, C-10814, C-13590.

6 Los Angeles Pacific Railroad Company of California, 5% First and Refunding Mortgage Gold Bond, $1,000.00, principal due September 1, 1943.
Numbered 2331, 3101, 3102, 3103, 3104, 3105.

9 The Western Pacific Railroad Company, $1,000.00 First Mortgage Gold Bond, Series A, 5%, principal due March 1, 1946.
Numbered M-6027 to M-6033, inclusive; M-16999, M-17000.

2 The Western Pacific Railroad Company, $100.00 First Mortgage Gold Bond, Series A, 5%, due March 1, 1946.
Numbered C-3164 and C-3165.

5 Union Iron Works Dry Dock Company, $1,000.00, 6%, Twenty Year Gold Bond, principal due October 1, 1929.
Numbered 551, 552, 554, 555, 556.

10 Liberty Farms Co. First Mortgage $1,000.00 6½% Serial Gold Bond, principal due April 1, 1933.
Numbered M-261 to M-270, inclusive.

10 Los Angeles Union Terminal Company, $1,000.00 First Mortgage 6% Serial Gold Bond, principal due November 1, 1934.
Numbered 937 to 941, inclusive, 1041 to 1045, inclusive. [27]

15 Tulare Lake Reclamation District No. 749, in the County of Kings, State of California, $1,000.00, 6% Gold Bond.
Numbered 29 to 33, inclusive, due July 1, 1931.
Numbered 101 to 105, inclusive, due July 1, 1934.
Numbered 142 to 146, inclusive, due July 1, 1935.

4 Santa Marina Building, $500.00, First Mortgage, 6% Serial Gold Bond, principal due July 1, 1937.
Numbered D-522, D-524, D-541, D-576.

5 Merchants Ice and Cold Storage Company, $1,000.00 First Mortgage 6½% Serial Gold Bond, principal due April 1, 1944.
Numbered M-1006 to M-1010 inclusive.

4 The Iowa Central Railway Company, First and Refunding Mortgage, 4% Fifty Year Gold Bond, $1,000.00, due March 1, 1951.
Numbered 2977, 2978, 2979 and 2980.

5 Bonds of the State of California, State Highway, Constitutional Amendment of 1919, $1,000.00, 4½%, dated July 3, 1919, due July 3, 1933.
Numbered 7480 to 7484, inclusive.

10 Pacific Gas and Electric Company, Series A, $1,000.00, First and Refunding Mortgage Gold Bond, 7%, due December 1, 1940.
Numbered M-1916 to M-1925, inclusive.

8 Santa Marina Building, $1,000.00 First Mortgage 6% Serial Gold Bond, principal due July 1, 1937.
Numbered M-325 to M-332, inclusive.

8 Series A Columbia Steel Corporation, $1,000.00, Fifteen Year First Mortgage 7% Sinking Fund Gold Bond, principal due February 1, 1938.
Numbered M-2661 to M-2668, inclusive.

1 Town and Country Club, $1,000.00 5% Second Mortgage Gold Bond, principal due April 1, 1933.
Numbered 27.

10 Los Angeles Gas and Electric Corporation, $1,000.00 General and Refunding Mortgage 5½% Gold Bond, Series F, due March 1, 1943.
Numbered M-1940 to M-1944, inclusive; M-2407, M-2408, M-2409, M-2298, M-2609.

5 San Francisco, Napa and Calistoga Railway, First Mortgage 6% Twenty-five Year $1,000.00 Gold Bond, principal due December 31, 1926.
Numbered 805 to 809, inclusive. [28]

4 Los Angeles Railway Corporation, $1,000.00 First and Refunding Mortgage Gold Bond, 5%, due December 1, 1940.
Numbered 10156, 10157, 10396, 10506.

10 Reclamation District No. 1004, $1,000.00 6% bond.
1 due January 1, 1933, numbered 196.
8 due January 1, 1936, numbered 373, 374, 375, 376, 362, 363, 364, 365.
1 due January 1, 1938, numbered 496.

20 San Francisco Napa and California Railway, 5% Twenty-five year Gold Debenture $500.00 bonds, principal due December 1, 1936.
Numbered 281 to 300 inclusive.

15 Pescadero Reclamation District number 2058, $1,000.00 Gold Bond, 6%.
3 due January 1, 1934, numbered 74, 75, 76.
2 due January 1, 1936, numbered 117, 118.
8 due January 1, 1939, numbered 198, 199, 200, 205, 206, 207, 218, 219.
2 due January 1, 1942, numbered 284, 285.

10 Series A, National Public Service Corporation, $1,000.00, Thirty Year 6½% Sinking Fund, Collateral Trust Gold Bond, principal due February 1, 1955.
Numbered M-6456 to M-6465, inclusive.

8 Associated Oil Company, $1,000.00 Twelve Year 6% Gold Note Principal due September 1, 1935.
Numbered 19381 to 19388, inclusive.

10 General Petroleum Corporation, $1,000.00 Five Year 6% Gold Note. Principal due April 15, 1928.
Numbered 4764M, 520M, 5900M, 5901M, 5902M, 5903M, 6446M, 7964M, 7965M, 8532M.

10 The Government of the French Republic External Loan of 1924, Twenty-five Year Sinking Fund 7% Gold Bond, $1,000.00 principal due December 1, 1949.
Numbered 53881 to 53890, inclusive.

9 Market Street Railway Company First Mortgage 7% Sinking Fund Gold Bond, Series A, $1,000.00, principal payable April 1, 1940.
Numbered M1413, M6017, M6018, M6025, M6890, M6891, M8910, M8576, M9545.

2 Market Street Railway Company First Mortgage 7% Sinking Fund Gold Bond, Series A, $500.00, Principal payable April 1, 1940.
Numbered D833, D834.

10 Walworth Company $1,000.00 First Mortgage Sinking Fund Gold Bond, Series A, 6%, principal due October 1, 1945.
Numbered M1360 to M1369, inclusive. [29]

8 State of Montana, County of Toole Irrigation District Fund Bonds, dated January 1, 1922, due January 1, 1930, Series D, $1,000.00.
Numbered 65 to 71, inclusive, and 74.

4 State of Montana, County of Toole Irrigation District Fund Bonds, dated January 1, 1922, due January 1, 1930, Series C, $500.00.
Numbered 43 to 46, inclusive.

STOCKS

187½ shares of stock in The Pioneer Real Estate Co. Evidenced by certificate number 4.

3 shares of stock in the Lagunitas Syndicate. Evidenced by certificate number 33.

111-1/9 shares of stock in Bay View Land Company. Evidenced by certificate number 32. (In the name of Allen I. Kittle, endorsed.)

350 shares of stock in the Pacific Oil Company. Evidenced by certificates numbered
S 4311 for 100 shares.
SO 2721 for 50 shares.
58006 for 100 shares.
55785 for 100 shares.

3 Association Certificates of Milk Producers Association of Central California. Evidenced by certificates numbered 2812, 2813 and 2814.

789 shares of The Natomas Land and Dredging Trust Limited. Par value 1 pound. British Corporation. Principal office London. Evidenced by certificates numbered
33 for 330 shares.
429 for 450 shares.

10 shares The Katharine Branson School, Inc., first preferred stock. Par value $100.00. Evidenced by certificate numbered 1P59.

110 shares The Central California Traction Company. Evidenced by certificate numbered 528.

80 shares Pacific Coast Casualty Company. Evidenced by certificates numbered
281 for 40 shares.
329 for 20 shares.
332 for 20 shares.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be and is hereby dis-

tributed shares of stock in corporations as follows, to wit:

300 shares of stock in California Packing Corporation.
75 shares to Lucia H. K. Sherman.
75 shares to Isabel K. Dibblee.
75 shares to Allen I. Kittle.
75 shares to John C. Kittle. [30]

36 shares of stock in The North American Company, common.
9 shares to Lucia H. K. Sherman.
9 shares to Isabel K. Dibblee.
9 shares to Allen I. Kittle.
9 shares to John C. Kittle.

100 shares of stock, preferred, in Petaluma and Santa Rosa Railway Company.
25 shares to Lucia H. K. Sherman.
25 shares to Isabel K. Dibblee.
25 shares to Allen I. Kittle.
25 shares to John C. Kittle.

77 shares of stock, common, in Petaluma and Santa Rosa Railway Company.
19 shares to Lucia H. K. Sherman.
19 shares to Isabel K. Dibblee.
20 shares to Allen I. Kittle.
19 shares to John C. Kittle.

105 shares of preferred stock in Western Power Corporation.
26 shares to Lucia H. K. Sherman.
26 shares to Isabel K. Dibblee.
26 shares to Allen I. Kittle.
27 shares to John C. Kittle.

90 shares of stock in The Morris Plan Company of San Francisco.
22 shares to Lucia H. K. Sherman.
23 shares to Isabel K. Dibblee.
22 shares to Allen I. Kittle.
23 shares to John C. Kittle.

50 shares of stock in the Northern Pacific Railway Company.
12 shares to Lucia H. K. Sherman.
13 shares to Isabel K. Dibblee.
13 shares to Allen I. Kittle.
12 shares to John C. Kittle.
(Evidenced by certificate of deposit No. F-13793 for 50 shares of the capital stock of the Northern Pacific Railway Company, deposited pursuant to agreement dated February 7, 1927.)

50 shares of stock in the Goodyear Tire & Rubber Company of California, preferred.
13 shares to Lucia H. K. Sherman.
12 shares to Isabel K. Dibblee.
12 shares to Allen I. Kittle.
13 shares to John C. Kittle.

20 shares of stock in the Herald Realty Company.
5 shares to Lucia H. K. Sherman.
5 shares to Isabel K. Dibblee.
5 shares to Allen I. Kittle.
5 shares to John C. Kittle. [31]

20 shares of stock in the Sheldon Townsite and Realty Company.
5 shares to Lucia H. K. Sherman.
5 shares to Isabel K. Dibblee.
5 shares to Allen I. Kittle.
5 shares to John C. Kittle.

70 shares of stock in The Bank of California, National Association.
- 17 shares to Lucia H. K. Sherman.
- 17 shares to Isabel K. Dibblee.
- 18 shares to Allen I. Kittle.
- 18 shares to John C. Kittle.

121 shares of preferred stock in the Natomas Company of California.
- 30 shares to Lucia H. K. Sherman.
- 31 shares to Isabel K. Dibblee.
- 30 shares to Allen I. Kittle.
- 30 shares to John C. Kittle.

300 shares of common stock in The Western Pacific Railroad Corporation.
- 75 shares to Lucia H. K. Sherman.
- 75 shares to Isabel K. Dibblee.
- 75 shares to Allen I. Kittle.
- 75 shares to John C. Kittle.

300 shares of stock in the Union Oil Company of California.
- 75 shares to Lucia H. K. Sherman.
- 75 shares to Isabel K. Dibblee.
- 75 shares to Allen I. Kittle.
- 75 shares to John C. Kittle.

Certificates representing preferred and common stock for $2,500.00 each, in the Russ Building Com-

pany, to Lucia H. K. Sherman, Isabel K. Dibblee, Allen I. Kittle, and John C. Kittle.

600 shares of stock in Bankers' Investment Company.
- 150 shares to Lucia H. K. Sherman.
- 150 shares to Isabel K. Dibblee.
- 150 shares to Allen I. Kittle.
- 150 shares to John C. Kittle.

150 shares of stock in Wells Fargo Bank & Union Trust Co.
- 37 shares to Lucia H. K. Sherman.
- 38 shares to Isabel K. Dibblee.
- 38 shares to Allen I. Kittle.
- 37 shares to John C. Kittle.

100 shares of stock in Pacific Gas and Electric Company.
- 25 shares to Lucia H. K. Sherman.
- 25 shares to Isabel K. Dibblee.
- 25 shares to Allen I. Kittle.
- 25 shares to John C. Kittle. All first preferred. [32]

50 shares of stock in Sherman Clay & Co.
- 12 shares to Lucia H. K. Sherman.
- 13 shares to Isabel K. Dibblee.
- 13 shares to Allen I. Kittle.
- 12 shares to John C. Kittle.

100 shares of common stock of The Atchison, Topeka and Santa Fe Railway Company.
- 25 shares to Lucia H. K. Sherman.
- 25 shares to Isabel K. Dibblee.
- 25 shares to Allen I. Kittle.
- 25 shares to John C. Kittle.

500 shares of common stock in the Shell Union Oil Corporation.
125 shares to Lucia H. K. Sherman.
125 shares to Isabel K. Dibblee.
125 shares to Allen I. Kittle.
125 shares to John C. Kittle.

50 shares of preferred stock in the Great Western Power Company of California.
12 shares to Lucia H. K. Sherman.
12 shares to Isabel K. Dibblee.
12 shares to Allen I. Kittle.
14 shares to John C. Kittle.

100 shares of prior preferred stock in San Joaquin Light and Power Corporation.
25 shares to Lucia H. K. Sherman.
25 shares to Isabel K. Dibblee.
25 shares to Allen I. Kittle.
25 shares to John C. Kittle.

608 shares of common stock in Pacific Gas and Electric Company. (New stock)
152 shares to Lucia H. K. Sherman.
152 shares to Isabel K. Dibblee.
152 shares to Allen I. Kittle.
152 shares to John C. Kittle.

100 shares of preferred stock in Los Angeles Gas and Electric Corporation.
25 shares to Lucia H. K. Sherman.
25 shares to Isabel K. Dibblee.
25 shares to Allen I. Kittle.
25 shares to John C. Kittle.

30 shares of prior preferred cumulative stock in Key System Transit Company.
- 7 shares to Lucia H. K. Sherman.
- 7 shares to Isabel K. Dibblee.
- 7 shares to Allen I. Kittle.
- 9 shares to John C. Kittle. [33]

30 shares of preferred stock in Key System Transit Company.
- 8 shares to Lucia H. K. Sherman.
- 7 shares to Isabel K. Dibblee.
- 7 shares to Allen I. Kittle.
- 8 shares to John C. Kittle.

20 shares preferred stock in Southern California Edison Company.
- 5 shares to Lucia H. K. Sherman.
- 5 shares to Isabel K. Dibblee.
- 5 shares to Allen I. Kittle.
- 5 shares to John C. Kittle.

800 shares of common stock in Southern California Edison Company. (New stock)
- 200 shares to Lucia H. K. Sherman.
- 200 shares to Isabel K. Dibblee.
- 200 shares to Allen I. Kittle.
- 200 shares to John C. Kittle.

Right to subscribe for and purchase 16 shares each of Southern California Edison Company common stock, to Lucia H. K. Sherman, Allen I. Kittle and John C. Kittle.

Right to subscribe for and purchase 18-8/12ths shares of common stock of Southern California Edison Company, to Isabel K. Dibblee.

425 shares of common stock in the Wickwire Spencer Steel Company.
106 shares to Lucia H. K. Sherman.
106 shares to Isabel K. Dibblee.
107 shares to Allen I. Kittle.
106 shares to John C. Kittle.

25 shares of preferred stock in The Pacific Telephone and Telegraph Company.
6 shares to Lucia H. K. Sherman.
6 shares to Isabel K. Dibblee.
7 shares to Allen I. Kittle.
6 shares to John C. Kittle.

10 shares of the common stock of the Pacific Telephone and Telegraph Company.
3 shares to Lucia H. K. Sherman.
3 shares to Isabel K. Dibblee.
2 shares to John C. Kittle.
2 shares to Allen I. Kittle.

255 shares first class 7% preferred stock of Hawaii Consolidated Railway Limited.
63 shares to Lucia H. K. Sherman.
63 shares to John C. Kittle.
64 shares to John C. Kittle.
63 shares to Allen I. Kittle. [34]

342 shares of preferred stock in The Western Pacific Railroad Corporation.
86 shares to Lucia H. K. Sherman.
85 shares to Isabel K. Dibblee.
86 shares to Allen I. Kittle.
85 shares to John C. Kittle.

31 shares preferred stock of California Electric Generating Company.
- 8 shares to Lucia H. K. Sherman.
- 9 shares to Isabel K. Dibblee.
- 7 shares to Allen I. Kittle.
- 7 shares to John C. Kittle.

662 shares of stock in Standard Oil Company of California.
- 166 shares to Lucia H. K. Sherman.
- 166 shares to Isabel K. Dibblee.
- 165 shares to Allen I. Kittle.
- 165 shares to John C. Kittle.

200 shares of common stock of General Cigar Co.
- 50 shares to Lucia H. K. Sherman.
- 50 shares to Isabel K. Dibblee.
- 50 shares to Allen I. Kittle.
- 50 shares to John C. Kittle.

269 shares of common stock of Pacific Lighting Corporation.
- 68 shares to Lucia H. K. Sherman.
- 67 shares to Isabel K. Dibblee.
- 67 shares to Allen I. Kittle.
- 67 shares to John C. Kittle.

50 shares of Kennedy Mining and Milling Company.
- 12 shares to Lucia H. K. Sherman.
- 13 shares to Isabel K. Dibblee.
- 13 shares to Allen I. Kittle.
- 12 shares to John C. Kittle.

50 shares of stock in California Market Properties Company.

13 shares to Lucia H. K. Sherman.

12 shares to Isabel K. Dibblee.

12 shares to Allen I. Kittle.

13 shares to John C. Kittle.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other property of every kind and nature whatsoever, and wheresoever situate, whether now known or discovered or not, and all property hereafter discovered, which may belong to said decedent, or to said estate, or in which the said decedent or said estate may have any interest, is hereby distributed share and share alike to LUCIA H. K. SHERMAN, ISABEL K. DIBBLEE, ALLEN I. KITTLE and JOHN C. KITTLE. [35]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by said executors with this Decree, and the production to this Court of satisfactory evidence of such compliance, said executors be discharged from all further duty and responsibility as such.

Done in open Court this 21st day of May, 1927.

EDWARD I. BUTLER,
Judge of said Superior Court.

[Endorsed]: Filed May 21, 1927. Rob. E. Graham, Clerk. By Geo. S. Jones, Deputy. [36]

EXHIBIT D.

In the Superior Court of the State of California, in and for the County of Marin.

No. 3427

In the Matter of the Estate of Harriette deWitt Kittle,

Deceased.

We, the undersigned distributees under the Decree of Distribution in the matter of the estate of Harriette deWitt Kittle, deceased, hereby agree upon the division as hereinafter set forth of the bonds ordered distributed to us by said Decree, and further hereby acknowledge that bonds in accordance with said agreement have been delivered to us this 26th day of May, 1927, as follows:

30 Key System Transit Company General and Refunding Mortgage Gold Bonds, $1,000.00, 5%, Series 1, due July 1, 1938.

7 bonds to Lucia H. K. Sherman.
8 bonds to Isabel K. Dibblee.
8 bonds to Allen I. Kittle.
7 bonds to John C. Kittle.

10 $1,000.00 School Bonds of Patterson School District, Stanislaus County, California, 5% Gold Bond.

3 bonds to Lucia H. K. Sherman.
3 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
2 bonds to John C. Kittle. [37]

5 Northwestern Electric Company, $1,000.00, 6% First Mortgage Twenty Year Sinking Fund Gold Bond, due May, 1935.
1 bond to Lucia H. K. Sherman.
1 bond to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
1 bond to John C. Kittle.

12 City of Sao Paulo, State of Sao Paulo, Brazil, $1,000.00 6% External Secured Sinking Fund Gold Bond.
3 bonds to Lucia H. K. Sherman.
3 bonds to Isabel K. Dibblee.
3 bonds to Allen I. Kittle.
3 bonds to John C. Kittle.

10 State of Sao Paulo, Brazil, $1,000.00 Twenty-five year 8% Secured Sinking Fund Gold Bond. External Loan of 1925, due January 1, 1950.
2 bonds to Lucia H. K. Sherman.
3 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
3 bonds to John C. Kittle.

10 Reno Light, Power and Water Company, $1,000.00, 6% Mortgage Sinking Fund Forty Year Gold Bond, principal due July 1, 1944.
3 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
3 bonds to John C. Kittle.

6 Southern Counties Gas Company of California, $1,000.00 5½% First Mortgage Twenty Year Sinking Fund Gold Bond, principal due May 1, 1936.

1 bond to Lucia H. K. Sherman.
1 bond to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

9 Petaluma and Santa Rosa Railroad Company, $1,000.00 First Mortgage 5½% Twenty-five Year Sinking Fund Gold Bond, due September 1, 1943.

2 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
3 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

17 Pacific Electric Railway Company, $1,000.00 5% First Mortgage Gold Bond, due January 1, 1942.

4 bonds to Lucia H. K. Sherman.
5 bonds to Isabel K. Dibblee.
4 bonds to Allen I. Kittle.
4 bonds to John C. Kittle. [38]

1 Post Street Investment Company, fifteen year note, $100.00, 6%, principal due April 1, 1938.

1 bond to Allen I. Kittle.

25 Great Western Power Company, $1,000.00 first mortgage, 5% Sinking Fund Forty Year Gold Bond, due July 1, 1946.

6 bonds to Lucia H. K. Sherman.
6 bonds to Isabel K. Dibblee.
6 bonds to Allen I. Kittle.
7 bonds to John C. Kittle.

10 Northern New York Power Corporation, First Mortgage, 6%, $1,000.00 Gold Bonds, principal due January 1, 1933.

2 bonds to Lucia H. K. Sherman.

2 bonds to Isabel K. Dibblee.

3 bonds to Allen I. Kittle.

3 bonds to John C. Kittle.

1 Wickwire Spencer Steel Company Five year 7% Class A Note, $1,000.00, principal due February 25, 1930.

1 bond to John C. Kittle.

12 Natomas Company of California General and Refunding Mortgage 6% Twenty Year Gold Bonds, $1,000.00, due January 1, 1935.

3 bonds to Lucia H. K. Sherman.

3 bonds to Isabel K. Dibblee.

3 bonds to Allen I. Kittle.

3 bonds to John C. Kittle.

2 Natomas Company of California General and Refunding Mortgage 6% Twenty Year Gold Bond, $500.00, due January 1, 1935.

1 bond to Allen I. Kittle.

1 bond to John C. Kittle.

23 Natomas Company of California General and Refunding Mortgage 6% Twenty Year Gold Bonds, $100.00 due January 1, 1935.

9 bonds to Lucia H. K. Sherman.

8 bonds to Isabel K. Dibblee.

3 bonds to Allen I. Kittle.

3 bonds to John C. Kittle.

6 Los Angeles Pacific Railroad Company of California, 5% First and Refunding Mortgage Gold Bonds, $1,000.00, principal due September 1, 1943.

2 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
1 bond to Allen I. Kittle.
1 bond to John C. Kittle. [39]

9 The Western Pacific Railroad Company, $1,000.00 First Mortgage Gold Bond, Series A, 5%, principal due March 1, 1946.

2 bonds to Lucia H. K. Sherman.
3 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

2 The Western Pacific Railroad Company, $100.00 First Mortgage Gold Bond, Series A, 5%, due March 1, 1946.

2 bonds to Isabel K. Dibblee.

5 Union Iron Works Dry Dock Company, $1,000.00, 6% Twenty Year Gold Bond, principal due October 1, 1929.

1 bond to Lucia H. K. Sherman.
1 bond to Isabel K. Dibblee.
1 bond to Allen I. Kittle.
2 bonds to John C. Kittle.

10 Liberty Farms Co. First Mortgage $1,000.00 6½% Serial Gold Bond, principal due April 1, 1933.

4 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

Los Angeles Union Terminal Company, $1,000.00 First Mortgage 6% Serial Gold Bond, principal due November 1, 1934.

2 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
3 bonds to Allen I. Kittle.
3 bonds to John C. Kittle.

Tulare Lake Reclamation District No. 749, in the County of Kings, State of California, $1,000.00, 6% Gold Bond.

5 bonds to Lucia H. K. Sherman.
4 bonds to Isabel K. Dibblee.
3 bonds to Allen I. Kittle.
3 bonds to John C. Kittle.

Santa Marina Building, $1,000.00, First Mortgage 6% Serial Gold Bond, principal due July 1, 1937.

2 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

Santa Marina Building, $500.00, First Mortgage 6% Serial Gold Bond, principal due July 1, 1937.

1 bond to Lucia H. K. Sherman.
1 bond to Isabel K. Dibblee.
1 bond to Allen I. Kittle.
1 bond to John C. Kittle. [40]

5 Merchants Ice and Cold Storage Company, $1,000.00 First Mortgage 6½% Serial Gold Bond, principal due April 1, 1944.

1 bond to Lucia H. K. Sherman.

2 bonds to Isabel K. Dibblee

1 bond to Allen I. Kittle.

1 bond to John C. Kittle.

4 The Iowa Central Railway Company, First and Refunding Mortgage, 4%. Fifty Year Gold Bond, $1,000.00, due March 1, 1951.

1 bond to Lucia H. K. Sherman.

1 bond to Isabel K. Dibblee.

1 bond to Allen I. Kittle.

1 bond to John C. Kittle.

5 Bonds of the State of California, State Highways, Constitutional Amendment of 1919, $1,000.00, 4½%, dated July 3, 1919, due July 3, 1933.

1 bond to Lucia H. K. Sherman.

2 bonds to Isabel K. Dibblee.

1 bond to Allen I. Kittle.

1 bond to John C. Kittle.

10 Pacific Gas and Electric Company, Series A, $1,000.00, First and Refunding Mortgage Gold Bond, 7%, due December 1, 1940.

3 bonds to Lucia H. K. Sherman.

2 bonds to Isabel K. Dibblee.

3 bonds to Allen I. Kittle.

2 bonds to John C. Kittle.

8 Series A Columbia Steel Corporation, $1,000.00, Fifteen Year First Mortgage 7% Sinking Fund Gold Bond, principal due February 1, 1938.
2 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

1 Town and Country Club, $1,000.00 5% Second Mortgage Gold Bond, Principal due April 1, 1933.
1 bond to Isabel K. Dibblee.

10 Los Angeles Gas and Electric Corporation, $1,000.00 General and Refunding Mortgage 5½% Gold Bond, Series F, due March 1, 1943.
3 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
3 bonds to Allen I. Kittle.
2 bonds to John C. Kittle. [41]

5 San Francisco, Napa and Calistoga Railway, First Mortgage 6% Twenty-five Year $1,000.00 Gold Bond, principal due December 31, 1926.
1 bond to Lucia H. K. Sherman.
1 bond to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
1 bond to John C. Kittle.

4 Los Angeles Railway Corporation, $1,000.00 First and Refunding Mortgage Gold Bond, 5%, due December 1, 1940.
1 bond to Lucia H. K. Sherman.
1 bond to Isabel K. Dibblee.
1 bond to Allen I. Kittle.

10 Reclamation District No. 1004, $1,000.00 6% bond.
2 bonds to Lucia H. K, Sherman.
3 bonds to Isabel K. Dibblee.
3 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

20 San Francisco, Napa and Calistoga Railway, 5% Twenty-five year Gold Debenture $500.00 bonds, principal due December 1, 1936.
5 bonds to Lucia H. K. Sherman.
5 bonds to Isabel K. Dibblee.
5 bonds to Allen I. Kittle.
5 bonds to John C. Kittle.

15 Pescadero Reclamation District Number 2058, $1,000.00 Gold Bond, 6%.
4 bonds to Lucia H. K. Sherman.
3 bonds to Isabel K. Dibblee.
4 bonds to Allen I. Kittle.
4 bonds to John C. Kittle.

10 Series A, National Public Service Corporation, $1,000.00, Thirty Year 6½% Sinking Fund, Collateral Trust Gold Bond, principal due February 1, 1955.
3 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
3 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

8 Associated Oil Company, $1,000.00 Twelve Year 6% Gold Note, Principal due September 1, 1935.
2 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

10 General Petroleum Corporation, $1,000.00 Five Year 6% Gold Note, Principal due April 15, 1928.

2 bonds to Lucia H. K. Sherman.
3 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
3 bonds to John C. Kittle. [42]

10 The Government of the French Republic External Loan of 1924, Twenty-five Year Sinking Fund 7% Gold Bond, $1,000.00, principal due December 1, 1949.

2 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
3 bonds to Allen I. Kittle.
3 bonds to John C. Kittle.

9 Market Street Railway Company First Mortgage 7% Sinking Fund Gold Bond, Series A, $1,000.00, principal payable April 1, 1940.

3 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
2 bonds to John C. Kittle.

2 Market Street Railway Company First Mortgage 7% Sinking Fund Gold Bond, Series A, $500.00, principal payable April 1, 1940.

2 bonds to Isabel K. Dibblee.

10 Walworth Company $1,000.00 First Mortgage Sinking Fund Gold Bond, Series A, 6%, principal due October 1, 1945.

2 bonds to Lucia H. K. Sherman.
2 bonds to Isabel K. Dibblee.
2 bonds to Allen I. Kittle.
4 bonds to John C. Kittle.

8 State of Montana, County of Toole Irrigation District Fund Bonds, dated January 1, 1922, due January 1, 1930, Series D, $1,000.00.

2 bonds to Lucia H. K. Sherman.

2 bonds to Isabel K. Dibblee.

2 bonds to Allen I. Kittle.

2 bonds to John C. Kittle.

4 State of Montana, County of Toole Irrigation District Fund Bonds, dated January 1, 1922, due January 1, 1930, Series C, $500.00.

1 bond to Lucia H. K. Sherman.

1 bond to Isabel K. Dibblee.

1 bond to Allen I. Kittle.

1 bond to John C. Kittle.

Checks to equalize said distribution have been received by us respectively in the amounts set opposite our respective names:

Lucia H. K. Sherman	$196.00
Isabel K. Dibblee	40.50
Allen I. Kittle	87.50

Lucia H. K. Sherman
John C. Kittle
Isabel K. Dibblee by B. H. D.
Allen I. Kittle. [43]

EXHIBIT E.

NP-2-28

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
and refer to Nov. 3, 1931

Mrs. Isabel K. Dibblee,
Hill Road,
Ross, California

Madam:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $1,690.30, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty

days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By J. C. WILMER
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870 [44]

STATEMENT

IT:AR:E-1
EEW-60D

In re: Mrs. Isabel K. Dibblee,
Hill Road,
Ross, California.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1928	$8,329.10	$6,638.80	$1,690.30

Reference is made to your income tax return for the year 1928, in connection with the report of the internal revenue agent in charge, San Francisco, California, covering an examination of your books of account and records for the year in question.

Reference is also made to a conference held in the office of the internal revenue agent on April 17,

1930, in connection with your protest of April 9, 1930.

The principal issue involved is whether or not tax should be computed at 12½% under the capital net gain provision on gain derived from sale of certain securities acquired by inheritance.

Stocks and bonds sold in 1928 were inherited by general bequest from your mother's estate. The personal property was distributed May 21, 1927.

In the computation of tax you used the appraised value of the securities in question at date of the death of your mother, March 28, 1926, for the purpose of establishing the two-year period required under the capital net gain provisions of section 101 of the Revenue Act of 1928.

It is held that in the case of personal property acquired by general bequest the two-year period contemplated by the capital net gain provisions of the Revenue Act of 1928, commences to run from the date of distribution. The findings of the revenue agent are, therefore, sustained.

Earned income credit has been determined in accordance with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of McLarry v. Commissioner (30 Fed. (2d) 789), that is, where husband and wife render separate income tax returns on the community basis, the wife may within the limitations provided in section 209 (a)(3) of the Revenue Act of 1926 and section 31(a) of the Revenue Act of 1928, treat as earned income one-half of the salaries, wages and other income of the husband which constitutes income re-

ceived for personal services actually rendered by him. [45]

Earned income has been increased from $5,000.00 to $16,130.70 and earned income credit increased from $22.50 to $167.61.

The changes in income are as follows:

Net income reported on return (not including capital net gain)		$38,454.61
Add:		
1. Ordinary income increased		28,408.61
Total ordinary income		$66,863.22
Capital net gain reported	$32,504.14	
Capital net gain corrected	4,773.70	4,773.70
Adjusted net income		$71,636.92

Computation of Tax

Adjusted net income	$71,636.92
Less:	
Capital net gain	4,773.70
Income subject to surtax	$66,863.22
Less:	
Dividends	13,425.80
Income subject to normal tax	$53,437.42
Normal tax at 1½% on $4,000.00	$ 60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $45,437.42	2,271.87
Surtax on $66,863.22	5,526.75
Tax at 12½% on capital net gain of $4,773.70	596.71
Total tax	$ 8,575.33

Less:		
Earned income credit	$167.61	
Tax paid at source	78.62	246.23
Tax Liability		$ 8,329.10
Tax assessed		6,638.80
Deficiency in tax		$ 1,690.30

[46]

Computation of Earned Income Credit

Earned net income	$16,130.70
Personal exemption claimed by husband	None
Normal tax at 1½% on $4,000.00	$ 60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $8,130.70	406.53
Surtax on $16,130.70	83.92
Total tax	$ 670.45
Credit of 25%	$ 167.61

Explanation of Changes

See explanation above.

You are advised that a copy of this communication has been transmitted to your attorney, Mr. Whitney B. Sanders, 351 California Street, San Francisco, California, who has on file in this office a duly authorized power of attorney.

[Endorsed]: United States Board of Tax Appeals. Filed Sept. 25, 1933. [47]

[Title of Court and Cause.]

Docket No. 61036.

Promulgated February 13, 1934.

Petitioner acquired certain stocks and bonds by general bequest under the will of her mother, who died on March 28, 1926. These securities were distributed to the petitioner under a decree of final distribution dated May 21, 1927, and were sold by her on certain dates extending from April 18 to December 18, 1928. In her return for 1928 petitioner reported the profit from the sales as capital net gain. The respondent included the profit as ordinary income, upon the ground that the securities had been held by the petitioner for a period of less than two years. *Held,* the respondent correctly determined that the date of distribution establishes the beginning of the period the securities were held by the petitioner, within the meaning of section 101 of the Revenue Act of 1928, and the petitioner is not entitled to report as capital net gain the profit from the sales of these securities.

Albert J. Dibblee, Esq., for the petitioner.
H. D. Thomas, Esq., for the respondent.

OPINION.

MATTHEWS: The respondent has determined a deficiency in income tax for the year 1928 in the amount of $1,690.30. Petitioner alleges that re-

spondent erred in determining that the two-year period contemplated by the "Capital Net Gain" provision of section 101 of the Revenue Act of 1928 commenced to run from the date of distribution to her of certain stocks which she had acquired by general bequest under the will of her deceased mother, and not from the date of her mother's death. The parties have filed a stipulation, from which we summarize the pertinent facts as follows:

Petitioner is an individual, residing at Ross, in Marin County, California. Her mother died testate on March 28, 1926, and in her will disposed of her property, leaving "All my property, real, personal and mixed, of any kind and nature whatsoever, and wherever situate, * * * unto my four children, Lucia Hamilton Kittle Sherman, Isabel Kittle Dibblee, Allen Irving Kittle, and John Casper Kittle, share and share alike." The will was duly probated and [48] the estate distributed under a decree of final distribution dated May 21, 1927, the petitioner receiving one fourth of certain stocks and bonds so distributed from the estate of her mother. Thereafter and on certain dates extending from April 18 to December 18, 1928, petitioner sold some of the securities thus acquired. These sales were made more than two years after the death of her mother, but less than two years after the date of the distribution to the petitioner of the property sold. In her income tax return for 1928 petitioner reported the profit from such sales as capital net gain in the amount of $27,712.33, based on the value of the se-

curities at March 28, 1926. The profit based on fair market value at the time of distribution is $28,441.86. Upon audit of the return the respondent included this latter amount as ordinary income and determined the deficiency in controversy.

Although it is alleged in the petition that respondent erroneously computed income from the sales in question on the basis of the value of the securities sold at the date of their distribution, petitioner has accepted the respondent's computation of profit as in conformity with the provisions of section 113 (a) (5) of the Revenue Act of 1928, as follows:

> Sec. 113. (a) (5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. *In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.* * * * [Italics supplied.]

It is still contended by the petitioner, however, that this profit of $28,441.86 should be treated as

capital net gain under the provisions of section 101 of the Revenue Act of 1928, set out in the margin,[1] on [49] the theory that petitioner acquired the securities in question at the date of her mother's death and that they were held by her for more than two years before they were sold. It is admitted that she did not hold these securities for more than two years

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[1] Sec. 101. (a) Tax in case of capital net gain.—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * * * *

(c) Definitions.—For the purposes of this title— * * *

* * * * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business) * * *. For the purposes of this definition—

* * * * * * *

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

after they were distributed to her, but the petitioner insists that the basic date for determining gain, under section 113 (a) (5), supra, is not necessarily the basic date for computing the running of the two-year period specified in section 101. Thus the petitioner urges that, although the value of the securities at the date of distribution is the correct basis for determining the amount of the gain from the sale thereof, it is the date of the death of the petitioner's mother which establishes the beginning of the period the securities were held by petitioner.

Petitioner has directed our attention to the laws of California, under which title to personal property transmitted by will vests in the legatee immediately upon the testator's death (secs. 28, 300, and 581 of the Probate Code.) Reliance is placed upon the case of Murphy v. Crouse, 135 Cal. 14, in which the Supreme Court of California held that both real and personal property descend directly to the beneficiary named in the will, with a qualified right in the personal representative who holds the property for purposes of administration, and it is pointed out that an undivided one-fourth interest in the estate of her mother vested in the petitioner in the instant case on March 28, 1926, the date of her mother's death. It does not follow, however, that from the moment of her mother's death the petitioner began holding one fourth of the specific assets of the estate. All of the decedent's property went into the possession of the executors and was chargeable with the expenses of administering the estate and the payment of debts. Clearly the petitioner

had no dominion or control over, and could not have sold, any of the particular assets until there had been a division of the estate among herself and the other legatees and certain specific assets had been delivered over to her. We cannot agree with the petitioner's contention that the issue before us for determination, which involves the taxable gain from the sale of certain securities, is governed by the laws of California with respect to the passing of legal title to property transmitted by will. In our opinion we must look to the provisions of the Federal taxing statutes. We have already shown that, under section 113 (a) (5), it is not the value of the property on the date she acquired legal title thereto, but the value on the date the securities were distributed to the petitioner, which is used as the basis for computing gain. It would be a forced construction of the statute to say that the date of distribution should not also be taken as the starting point for determining the period the securities were held by the petitioner. [49]

The securities in question were sold by the petitioner during the taxable year 1928, between April and December. Petitioner had acquired the securities by general bequest under the will of her deceased mother and they were distributed to the petitioner under a decree of final distribution dated May 21, 1927. Prior to that date the possession of the securities was in the executors of the estate for purposes of administration and not in the petitioner. In view of these facts we conclude that the petitioner had not held the assets, within the meaning

of section 101, for a period of two years before they were sold and is, therefore, not entitled to report the profit as capital net gain.

The view which we have taken herein is in accordance with our decision in the case of Nancy K. McFeely, 29 B. T. A.—(No. 177), which case is not identical upon the facts but presents the same question of law. In that case we held that the profit on the sale of shares of stock distributed to the petitioner on November 3, 1927, and sold by her on March 14, 1929, was not taxable as capital net gain, although the petitioner's donor (her mother) had acquired in 1919 an absolute title to one half of the estate of a deceased husband and the stock in question was received by the petitioner under an assignment to her, dated June 23, 1924, of 10 percent of the donor's one-half interest in the estate. We said:

> In our opinion the evidence does not support the contentions of the petitioner. While the shares of stock were in the custody of the executors of the estate of T. H. Given they were not in any proper sense "held" by the petitioner. If the executors by agreement of the parties or otherwise had sold the shares and realized a profit therefrom the profit would unquestionably have been taxable to the estate and not to the beneficiaries. Anderson v. Wilson, 289 U. S. 20.
>
> It seems clear that if Martha A. Given [the donor] had not assigned any portion of her estate to the petitioner, but had received the

1,000 shares of Radio stock in question on November 3, 1927, and had sold them on March 14, 1929, the profit would have constituted ordinary net income and would have been taxable accordingly, for she would have held them for a period of less than two years at date of sale. Section 113 (a) (5). We can not see that the petitioner stands in any better position than her donor.

The respondent's determination is sustained.
Reviewed by the Board.
Judgment will be entered for the respondent.

LANSDON, dissenting: I am able to agree with the prevailing opinion. Under the laws of California, which govern here as to rules of property, it is well established that title to devised property vests in the legatee at the date of the death of the prior owner. Probate Code, secs. 28, 300, 581. In Murphy v. Crouse, 135 Cal. 14, the Supreme Court of California held that the common law doctrine that the title to personal property passes to the executor and not to the heir has never prevailed in California and that in that state both real and personal property descend directly to the beneficiary named in the will, subject only to the qualified right in the personal representative who holds it for purposes of administration. In Western Pacific Co. v. Godfrey, 166 Cal. 346, the court held that "The legatee does not derive title from the decree of dis-

tribution but from the will, which takes effect immediately upon the death of the testator. The decree of distribution does not create the title. It merely declares that title accrued under the will." This principle was nationalized by the Supreme Court in Brewster v. Gage, 280 U. S. 327, and has been applied by the Board in many decisions.

The securities sold were a part of the estate of the petitioner's mother at the date of her death. In the light of the authorities above cited it is perfectly clear that an undivided one-fourth interest therein vested in the petitioner at March 28, 1926. I think it immaterial that such interest was not identified or segregated from the corpus of the estate until May 21, 1927, the date of distribution. From the moment of her mother's death, title to one fourth of all the securities left by the decedent vested in the petitioner. The executor or personal representative of the estate held the property only as the agent of the actual owner or of the probate court. His possession was the possession of the heirs. California Civil Code, sec. 1581. His duty is to marshal and conserve the assets of the estate and, under the direction and order of the proper court, distribute them to their real owners. Without the consent of the court he cannot convert a dollar's worth of the assets in his charge into new investments. Subjected to such limitations, it is plain that he holds only for the owners and that his acts are theirs.

In support of his determination the respondent relies on sections 113 (a) (5) and on 101 (c) (8) (B) of the Revenue Act of 1928, which provides that to

determine the two year period "there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person." I cannot see the applicability of this provision to the situation here. In my opinion the securities in question were acquired by the petitioner at the date of her mother's death and held by her until the date of the sale, and so, for the purpose of this proceeding, were never held by any other person.

TRAMMELL agrees with this dissent. [50]

United States Board of Tax Appeals
Washington

Docket No. 61036.

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its report promulgated February 13, 1934, it is

ORDERED and DECIDED: That there is a deficiency of $1,690.30 for the year 1928.

[Endorsed]: Entered Feb. 16, 1934.

[Seal] (Signed) H. F. SEAWELL
Member. [51]

[Title of Court and Cause.]

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND ASSIGNMENT OF ERROR.

Now comes Isabel K. Dibblee, the petitioner above named, by her attorney, Albert J. Dibblee, and respectfully shows:

I.

That petitioner is an individual, and at all times hereinafter mentioned was, and now is, a married woman, a citizen of the United States and of the State of California, and a resident of the Town of Ross, County of Marin, State of California.

II.

That petitioner filed her individual Federal Income Tax return for the taxable year 1928 on or before the 15th day of March, 1929 in the office of the Collector of Internal Revenue for the First District of California, which is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. [52]

III.

That the nature of the controversy is as follows, to wit:

Petitioner's mother, Harriet deWitt Kittle, a resident of the Town of Ross, Marin County, California, died on March 28, 1926, leaving a last will and testament whereby she devised and bequeathed all of her property to her four children, Lucia Hamilton Kittle, Isabel Kittle Dibblee, petitioner above named, Allen Irving Kittle and John Casper Kittle, share and share alike. Said will was duly admitted to probate and the estate was thereafter by decree of final distribution made and entered May 21, 1927, distributed according to the provisions of her said will, petitioner receiving one-fourth of certain stocks and bonds from her mother's estate. Thereafter during the period between April 17, 1928 and December 17, 1928, petitioner sold certain of the stocks and bonds so acquired by her under her mother's will, as aforesaid, all of which sales were made more than two years after her mother's death, but less than two years after the date of distribution of her mother's estate.

In her income tax return for the taxable year 1928 petitioner reported the profit from the sale of said stocks and bonds as "capital net gain" in the amount of $27,712.33, based upon the value of said securities as of March 28, 1926; the respondent upon audit of petitioner's said return fixed the profit on said sales at the sum of $28,441.86, based upon the fair market value of the securities at the date of

distribution, which latter amount petitioner has accepted as the profit upon said sales of said securities. [53]

The respondent in his notice of deficiency, dated November 3, 1931, held that the two year holding period contemplated by the capital net gain provisions of the Revenue Act of 1928 commenced to run from the date of distribution, and not from the date of death; that said sum of $28,441.86 was taxable as "ordinary net income" and not as "capital net gain," and computed the tax accordingly, resulting in an asserted deficiency of $1,690.30.

IV.

That petitioner appealed from the said determination of the respondent to the United States Board of Tax Appeals and the controversy was submitted to the said Board at a hearing held in San Francisco, California, on September 25, 1933, upon an agreed statement of facts. The Board thereafter sustained said determination of respondent and ordered judgment entered in his favor. The report and opinion of the Board was promulgated on the 13th day of February, 1934, and its final order adjudging that there was a deficiency of $1,690.30 for the year 1928 was entered on the 16th day of February, 1934.

V.

That said petitioner, being aggrieved by the conclusions of law contained in the opinion and decision of the Board of Tax Appeals, and by said

final order, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit, wherefore she petitions that a transcript of record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit and transmitted to the Clerk of said Court for filing and appropriate action, to the end that the errors complained of may be reviewed [54] and corrected by said court.

VI.

That said petitioner's assignments of errors are as follows:

(1) The Board of Tax Appeals erred in holding and determining that there was a deficiency of $1,690.30, or any deficiency whatsoever, in the amount of petitioner's income tax for the taxable year 1928.

(2) The Board of Tax Appeals erred in not holding and determining that there was no deficiency for the taxable year 1928.

(3) The Board of Tax Appeals erred in holding and determining that the securities acquired by petitioner under her mother's will did not constitute "capital assets" of petitioner within the meaning of section 101(c)(8) of the Revenue Act of 1928, at the time she sold said securities.

(4) The Board of Tax Appeals erred in not holding and determining that the securities acquired by petitioner under her mother's will constituted "capital assets" of petitioner within the meaning

of section 101(c)(8) of the Revenue Act of 1928, at the time she sold said securities.

(5) The Board of Tax Appeals erred in holding and determining that the profit from the sale of said securities by petitioner were taxable as "ordinary net income" and not as "capital net gain."

(6) The Board of Tax Appeals erred in not holding and determining that the profits from the sale of said securities by petitioner were taxable as "capital net gain". [55]

(7) The Board of Tax Appeals erred in holding and determining that the securities acquired by petitioner under her mother's will were not "held" by her, within the meaning of section 101(c)(8) of the Revenue Act of 1928, from the date of the death of her mother.

(8) The Board of Tax Appeals erred in not holding and determining that the securities acquired by petitioner under her mother's will were "held" by her, within the meaning of section 101(c)(8) of the Revenue Act of 1928, from the date of the death of her mother.

(9) The Board of Tax Appeals erred in holding and determining that the securities acquired by petitioner under her mother's will were "held" by her, within the meaning of section 101(c)(8) of the Revenue Act of 1928, only from and after the date of decree of distribution of her mother's estate.

(10) The Board of Tax Appeals erred in holding and determining that the laws of the State of

California with respect to the passing of legal title to property transmitted by will are not controlling upon the Board as to the character of petitioner's property rights and title in and to the securities acquired by her under her mother's will.

(11) The Board of Tax Appeals erred in not holding and determining that the laws of the State of California with respect to the passing of legal title to property transmitted by will are controlling upon the Board as to the character of petitioner's property rights and title in and to the securities acquired by her under her mother's will.

(12) The Board of Tax Appeals erred in holding and [56] determining that because under section 113(a)(5) of the Revenue Act of 1928 the value of the securities on the date of distribution to petitioner is the basis for determining gain or loss, said date must necessarily be taken as the starting point for determining the period the securities were "held" by petitioner under section 101 (c)(8) of said Act.

(13) The Board of Tax Appeals erred in holding and determining that the possession of the securities by the executors pending administration of the estate was adverse to petitioner.

(14) The Board of Tax Appeals erred in not holding and determining that the possession of the securities by the executors pending administration of the estate was held by them as representatives of petitioner, and was not adverse to petitioner.

WHEREFORE petitioner prays that said decision of the United States Board of Tax Appeals

be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

ALBERT J. DIBBLEE
670 Mills Building
San Francisco, California.
Attorney for Petitioner. [57]

State of California,
City and County of San Francisco—ss.

Albert J. Dibblee, being first duly sworn, deposes and says:

That he is the attorney for the above named petitioner, Isabel K. Dibblee, and as such is duly authorized to verify the foregoing petition for review to the United States Circuit Court of Appeals for the Ninth Circuit; that he has read said petition for review and is familiar with the statements therein contained, and that the same are true to the best of his knowledge, information and belief.

ALBERT J. DIBBLEE

Subscribed and sworn to before me this 2nd day of May, 1934.

[Seal] IRENE MURPHY

Notary Public in and for the City and County of San Francisco, State of California. My commission expires March 10, 1938.

[Endorsed]: United States Board of Tax Appeals. Filed May 8, 1934. [58]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States Board of Tax Appeals:

Please prepare at petitioner's expense a transcript of the record in the above entitled cause within sixty days from the filing of the petition for review in the above entitled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, including in said transcript, copies, duly certified as correct, of the following documents:

1. The docket entries of proceedings before the Board.
2. The pleadings before the Board.
3. Opinion and decision of the Board.
4. The final order of redetermination entered on February 16, 1934.
5. The petition for review.
6. The agreed statement of facts upon which the above entitled cause was heard.
7. Any and all orders of enlargements made by the Board [59] with respect to the preparation of record on appeal. (Not included in record.)
8. This praecipe.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby advised that on the 2nd day of May, 1934, being the same date as that on which

the petition for review in the above entitled cause was mailed to the Board of Tax Appeals, a copy of said petition and a notice of the filing of the same, was mailed to the respondent herein, addressed to him at Washington, D. C.

Dated: May 2, 1934.

ALBERT J. DIBBLEE
670 Mills Building
San Francisco, California
Attorney for Petitioner.

[Endorsed]: United States Board of Tax Appeals. Filed May 8, 1934. [60]

[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 60, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 2nd day of June, 1934.

[Seal] B. D. GAMBLE
Clerk, United States Board
of Tax Appeals.

cs

[Endorsed]: No. 7524. United States Circuit Court of Appeals for the Ninth Circuit. Isabel K. Dibblee, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed June 19, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7524

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals
for the Ninth Circuit

Extract from minutes of Friday, January 25, 1935.

Before: WILBUR and GARRECHT,
Circuit Judges, and
CAVANAH, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED petition to review in this cause argued by Mr. Albert J. Dibblee, counsel for petitioner, and by Mr. Lucius A. Buck, Special Assistant to the Attorney General, Counsel for respondent, and submitted to the court for consideration and decision.

[Title of Court.]

Extract from minutes of Tuesday, February 5, 1935.

Before: WILBUR and GARRECHT,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause, be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Before: WILBUR and GARRECHT,
Circuit Judges, and
CAVANAH, District Judge.

CAVANAH, District Judge:

This case involves a deficiency in income taxes in the sum of $1690.30 for the year 1928. The Board of Tax Appeals redetermined the deficiency and affirmed the determination of the Commissioner, wherein it was held that petitioner acquired the securities in question at the date of the distribution and not at the time of her mother's death. Petitioner contends that the Board erred in holding that the two year period contemplated by the "capital net gain" provision of Section 101 of the Revenue Act of 1928 commenced to run from the date of distribution to her of the securities she had acquired by general bequest under the will of her mother, and not from the date of her mother's death; so the sole question is whether the gain on the sale of the securities received by petitioner as a general legatee under her mother's will, less than two years after distribution and more than two years after the death of the testatrix, constitutes capital net gain or ordinary income.

Petitioner is a citizen and resident of California. Her mother died testate on March 28, 1926, and

disposed of her property by will, leaving all of it to four of her children in equal shares. The will was probated in California and the estate distributed under a decree of final distribution on May 21, 1927, and petitioner received one-fourth of certain bonds and securities so distributed. More than two years after the death of the testatrix, but less than two years after the date of distribution, petitioner sold some of the securities. In her income tax return for 1928 she reported from such sales as capital net gain the amount of $27,712.33, based on the value of the securities as of the date of the death of the testatrix, while the profit based on fair market value at the time of distribution was $28,441.86. Respondent, in auditing the return, included this latter amount as ordinary income and determined the deficiency in dispute.

The controversy arises from an application and interpretation of the provisions of Section 101 and Section 113 (a) (5), which definitely establish both the method of determining the period of holding and the basis for the determination of the taxpayer's gain. They are to be read together and, when done so, on all personal property acquired by specific bequest the basis shall be the fair market value of the property at the time of the death of the decedent, and if the property be acquired either by will or by intestacy the basis shall be the fair market value of it at the time of distribution to the taxpayer. Capital assets, as defined by Section 101 (c) (8) of the Revenue Act means "property held by the taxpayer for more than two years".

Petitioner asserts that under these provisions of the act the profit resulting from the sale of the securities was "capital gain" and, consequently, taxable as such, and not as "ordinary income", and if correct there would be no deficiency.

The securities upon which petitioner realized a profit of $28,441.86 were the property of decedent at the time of her death, which was more than two years before the date of sale, and were acquired by petitioner as a general bequest of personal property by will, and would seem to be governed by the provision in Section 113 (a) (5) of the act, that

> "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

But it is argued by petitioner that the laws of California determine the date from which the taxpayer "held" the securities in question, as under the laws of that State the legal title to property transmitted by will or intestacy vests immediately upon the decedent's death in the devisee, legatee or heir, as the case may be. We cannot agree with the correctness of the contention, for the Federal statute determines the time the taxpayer "acquired" personal property, when acquired as a general bequest by will, to be at the time of the distribution to the taxpayer, and not at the time of decedent's death. Therefore, the taxpayer is considered as "holding" the securities only from the time of distribution. The purposes or effect of the revenue laws of the

United States cannot be contravened by state law. Burk-Waggoner Assn. v. Hopkins, 269 U. S. 110; *Weiss v. Wiener,* 279 U. S. 333; Corliss v. Bowers, 281 U. S. 376, 378.

The decision of the Board of Tax Appeals is affirmed.

[Endorsed]: Opinion. Filed Feb. 5, 1935. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 7524

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JUDGMENT

Upon Petition to Review an Order of the United States Board of Tax Appeals,

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Feb. 5, 1935. Paul P. O'Brien, Clerk.

[Title of Court.]

Extract from minutes of Friday, September 6, 1935.

Before: WILBUR, GARRECHT, DENMAN, and MATHEWS, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of taxpayer, filed March 6, 1935, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Albert J. Dibblee, counsel for the petitioner, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including October 7, 1935; and in the event the petition for a writ of certiorari to be made by the petitioner herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
Senior United States Circuit Judge.

Dated: San Francisco, California, September 6, 1935.

[Endorsed]: Filed Sep. 6, 1935. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-six (96) pages, numbered from and including 1 to and including 96, to be a full, true and corect copy of the entire record of the above entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of September, A. D. 1935.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for argument immediately following No. 439.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 494

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Minneapolis, Minnesota.

OF COUNSEL:
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Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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Supreme Court of the United States

OCTOBER TERM, 1935.

No.....

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Isabel K. Dibblee prays for a writ of certiorari to review an opinion of the United States Circuit Court of Appeals for the Ninth Circuit (75 Fed. (2d) 617; R. 92-95), filed on February 5, 1935, affirming an order of redetermination of the United States Board of Tax Appeals (R. 78, 79).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner is and at all times hereinafter mentioned was a taxpayer domiciled in the State of California (R. 16). On March 28, 1926, Harriett deWitt Kittle, the mother of petitioner, died domiciled in the State of California leav-

ing by will all her property to her four children share and share alike (R. 16, 21, 22). The decedent's will was duly probated, and her estate, upon decree of final distribution dated May 21, 1927 (R. 32-52), was distributed according to the terms of the will. Petitioner received as part of her share of the estate specific stocks and bonds (R. 17-19).

At various times between April 18, 1928, and December 18, 1928, petitioner sold on the market certain of the bonds and shares of stock she had so received from her mother (R. 19, 20). It is evident that said sales were made more than two years after her mother's death but less than two years after the date of the decree of distribution of her mother's estate (R. 20). Petitioner realized gains upon said sales in the total amount of $28,441.86 (R. 21), and, in her income tax return for the calendar year 1928, computed and reported her gains upon said sales as capital gains taxable at the capital gain rates on the theory they were realized from sales of capital assets within the meaning of Section 101 (c) of the Revenue Act of 1928, 45 Stat. 791, 811 (R. 21). Respondent contends that the gains are taxable as ordinary income at the normal and surtax rates and he asserted a resulting deficiency of $1,690.30 in petitioner's income tax for the calendar year 1928 (R. 64-68). The United States Board of Tax Appeals entered its decision for respondent (R. 78, 79). That decision was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit (R. 95).

QUESTION PRESENTED.

May bonds and shares of stock acquired by petitioner, as a general legatee under the will of a decedent who died March 28, 1926, and sold or otherwise disposed of by petitioner only on dates between April 18, 1928, and December

18, 1928, be said *not* to have been held for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, 45 Stat. 791, 811, merely because the decree of distribution of the estate of the decedent was not entered until May 21, 1927?

REASONS FOR ALLOWANCE OF THE WRIT.

1. The decision below is in direct conflict with the decision rendered by the United States Circuit Court of Appeals for the First Circuit in *First National Bank of Boston vs. United States* (1935), 76 Fed. (2d) 200. A petition for a writ of certiorari in the *First National Bank of Boston* case has been filed with the Clerk of this Court by the Government and the case is No. 110 on the October, 1935, Docket.

2. The decision below is in direct conflict with the decision rendered by the United States Circuit Court of Appeals for the First Circuit in *Lee vs. Commissioner of Internal Revenue* (1935), 76 Fed. (2d) 203. A petition for a writ of certiorari in the *Lee* case has been filed with the Clerk of this Court by the Government and the case is No. 111 on the October, 1935, Docket.

3. The point of law at issue in the instant case was taken by the United States Board of Tax Appeals below (R. 75, 76) to be the same as that presented in *McFeely vs. Commissioner of Internal Revenue* (1934), 29 B. T. A. 998, affirmed (C. C. A. 3, 1934), 74 Fed. (2d) 1017, in which case this Court *granted* a petition for a writ of certiorari on May 20, 1935, ... U. S. .... (Docket No. 24).

4. The decision below is in conflict with the principle, enunciated by this Court in *Brewster vs. Gage* (1930), 280 U. S. 327, that a legatee acquires property from the estate

of a decedent as of the date of the decedent's death and not as of the date of distribution.

5. The decision below is necessarily in conflict with California statutes and with applicable local decisions in that it fails to give effect to the California rule that legal title to personal property vests in the legatee forthwith upon a testator's death, that that title is in no way dependent upon the decree of distribution, and that the executor's possession of the property of an estate is the possession of the legatee.

6. The decision below is in conflict with the principle, enunciated by this Court in *Helvering vs. Bliss* (1934), 293 U. S. 144, that the capital gain sections of the Federal Revenue Acts are liberalizations of the law and are not to be narrowly construed.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit and submits her brief, hereto attached, in support of this petition.

Respectfully submitted,

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OF COUNSEL:

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Supreme Court of the United States

OCTOBER TERM, 1935.

No.....

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The memorandum opinion of the United States Board of Tax Appeals (R. 69-78) was promulgated February 13, 1934, and is found at 29 B. T. A. 1070. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 92-95) was filed February 5, 1935, and is found at 75 Fed. (2d) 617.

JURISDICTION.

This petition is submitted under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938. The date of the judgment asked to be reviewed is February 5, 1935 (R. 95). Petitioner's petition for rehearing was denied September 6, 1935 (R. 96).

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding:

1. That the bonds and shares of stock sold by petitioner were held by her, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, only from the date of distribution of the decedent's estate and not from the date of death of the decedent.

2. That the bonds and shares of stock sold by petitioner between April 18, 1928, and December 18, 1928, both dates inclusive, were not, at the time of sale, capital assets within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

3. That Section 101 and Section 113 (a) (5) of the Revenue Act of 1928 are to be read together and that basis date and acquisition date must necessarily be one and the same.

4. That the gains realized by petitioner upon the sale of said shares were not taxable at the rate applicable to capital gains but were taxable as ordinary income at the normal and surtax rates.

5. That the California rule that title to property transmitted by will vests in the legatee immediately upon the decedent's death is not material in determining the date from which the legatee holds property within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

6. That the determination of the United States Board of Tax Appeals that there was a deficiency in petitioner's income tax for the calendar year 1928 in the amount of One Thousand Six Hundred Ninety and 30/100 Dollars ($1,690.30) was not correct.

ARGUMENT.

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION RENDERED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN FIRST NATIONAL BANK OF BOSTON VS. UNITED STATES (1935), 76 FED. (2D) 200.

The facts of the *First National Bank of Boston* case, in so far as they are pertinent here, are similar to those of the instant case: The petitioners were testamentary trustees of the residuum of an estate consisting in part of securities. More than two years after the death of decedent, but less than two years after the residue was turned over to the petitioners by the executor, some of the securities were sold at a price above their basis for tax purposes. The Court held, under *Brewster vs. Gage* (1930), 280 U. S. 327, that the petitioners acquired and therefore held the corpus of the trust for more than two years prior to said sale and that the gain realized was a capital gain and was to be taxed as a capital gain.

The United States Circuit Court of Appeals for the Second Circuit specifically recognized the conflict existing between the decision of the First Circuit and the decision of the court below when it said, in *Ogle vs. Helvering* (1935), 77 Fed. (2d) 338, 339:

> "The question is whether she 'held' the shares from October 31, 1925, or from January 28, 1927; on this depends her privilege under Section 101 (a) to limit her tax to one-eighth of the gain. If she 'held' them only from the date of distribution, the gain was part of her ordinary income, as the commissioner and the Board have held. The Circuit Courts of Appeal of the Third

and Eighth (Ninth) Circuits have decided the point in favor of the Treasury; that of the First, *contra*. *McFeely vs. Helvering*, 74 F. (2) 1017 (C. C. A. 3); *Dibblee vs. Helvering*, 75 F. (2) 617 (C. C. A. 9); *First National Bank vs. United States*, 75 F. (2) .... (C. C. A. 1)."

The United States Circuit Court of Appeals for the Eighth Circuit also recognized the conflict existing between the decision below and that of the First Circuit when it said, in *Rand vs. Helvering* (1935), ... Fed. (2d) .... (353-A Commerce Clearing House, paragraph 9542; Prentice Hall, Inc. Federal Tax Service, 1935, paragraph 1789):

"Whether such holding was for more than two years, depends upon whether it began at the death of Alonzo T. Rand or at the date of distribution of this stock to petitioner. The Board confirmed the Commissioner (30 B. T. A. 1464), upholding date of distribution. This it did upon the authority of McFeely, 29 B. T. A. 998 and Dibblee, 29 B. T. A. 1070, without further statement of reasons. These two citations have passed to affirmance in *McFeely vs. Helvering*, 74 F. (2d) 1017, C. C. A. 3, and *Dibblee vs. Helvering*, 75 Fed. (2d) 617, C. C. A. 9. The same view has been taken in *Ogle vs. Helvering*, 77 Fed. (2d) 338, C. C. A. 2 (where the petitioner was another heir of Alonzo T. Rand), and the contrary view is declared in *First Nat. Bank of Boston vs. United States*, 76 Fed. (2d) 200, C. C. A. 1."

A petition for a writ of certiorari in the *First National Bank of Boston* case has been filed by counsel for the Government and the case is No. 110 on the October, 1935, Docket.

2. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION RENDERED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN LEE VS. COMMISSIONER OF INTERNAL REVENUE (1935), 76 FED. (2D) 203.

In the *Lee* case

> "The main issue is the same as that involved in the case of *First National Bank of Boston, et al., vs. United States*, 76 F. (2) 200, decided by this Court on March 9, 1935. There was a sale of securities by a residuary legatee in 1929, more than two years after the death of the testator, but less than two years from the date of distribution. * * * Since the acquisition of the securities sold dates back to the death of the testator, *Brewster vs. Gage*, 280 U. S. 327, * * * they were held more than two years and should be treated in assessing the tax as a capital gain, although the amount of the gain was properly determined under Sec. 113 (a) (5). See *First National Bank of Boston, et al., vs. United States, supra.*"

The identity of the Court's conclusion in the *Lee* case with that reached in *First National Bank of Boston vs. United States* necessarily demonstrates its conflict with the decision of the Ninth Circuit below.

A petition for a writ of certiorari in the *Lee* case has been filed by counsel for the Commissioner and the case is No. 111 on the October, 1935, Docket.

3. THE POINT OF LAW AT ISSUE IN THE INSTANT CASE WAS TAKEN BY THE UNITED STATES BOARD OF TAX APPEALS BELOW TO BE THE SAME AS THAT PRESENTED IN McFEELY VS. COMMISSIONER OF INTERNAL REVENUE (1934), 29 B. T. A. 998, AFFIRMED (C. C. A. 3, 1934), 74 FED. (2D) 1017, IN WHICH CASE THIS COURT GRANTED A PETITION FOR A WRIT OF CERTIORARI, ON MAY 20, 1935, ... U. S. .....

In the *McFeely* case one Given died domiciled in Pennsylvania in 1919. In the same year his widow elected to take against the will of her husband one-half of his estate in lieu of her dower under the laws of Pennsylvania. No later than August 1, 1925, the widow gave the petitioner one-tenth of her interest in said estate. The petitioner received securities as her interest upon the distribution of the estate on November 3, 1927. The petitioner sold at a gain certain of these securities on March 14, 1929. In her income tax return the petitioner treated that gain as a capital gain. The Commissioner determined that it was ordinary income. The Board of Tax Appeals upheld the Commissioner's determination, 29 B. T. A. 998, and the United States Circuit Court of Appeals for the Third Circuit affirmed that decision on the bare ground that no precedent or principle was involved, 74 Fed. (2d) 1017.

It is thus evident that in the *McFeely* case a result similar to that in the decision below was reached. Indeed, the United States Board of Tax Appeals rested its decision below flatly upon the authority of its earlier opinion in the *McFeely* case (R. 75):

> "The view which we have taken herein is in accordance with our decision in the case of *Nancy K. McFeely*, 29 B. T. A. .... (No. 117), which case is not identical upon the facts, but presents the same question of law."

It is submitted that, inasmuch as, on May 20, 1935, a petition for a writ of certiorari was granted by this Court in the *McFeely* case, ... U. S. ....., petitioner's application for a writ of certiorari in the instant case should also be granted.

4. THE DECISION BELOW IS IN CONFLICT WITH THE PRINCIPLE, ENUNCIATED BY THIS COURT IN BREWSTER VS. GAGE (1930), 280 U. S. 327, THAT A LEGATEE ACQUIRES PROPERTY FROM THE ESTATE OF A DECEDENT AS OF THE DATE OF DECEDENT'S DEATH AND NOT AS OF THE DATE OF DISTRIBUTION.

In *Brewster vs. Gage*, this Court decided that, under Section 202 (a) (3) of the Federal Revenue Act of 1921, which defined the basis of property acquired by inheritance to be its fair market price or value "at the time of such acquisition," the basis of stocks passing to a residuary legatee is not their value at the date of distribution, but is, instead, their value at the date of decedent's death. In so holding this Court said:

> "Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. * * *
>
> "* * * And we think that in substance it would not

be inconsistent with the rules of law governing the descent and distribution of real and personal property of decedents to construe the words in question to mean the date of death. * * *

"* * * The generality of the words used in both Acts indicates intention that the value at the time of death of the decedent was to be taken as the basis in all cases" (pp. 334, 335 of 280 U. S.).

The Court below, on the other hand, fails utterly to recognize that a general legatee, upon the death of a decedent, is vested immediately with a right to his distributive share; that the decree of distribution confers no new right upon the legatee; and that his title relates back to the date of death. No mention is made by the Court below of the *Brewster* case. It is submitted that, by overlooking that decision, the Court below runs counter to this Court's enunciation therein, and reaches the absurd conclusion that, although a general legatee does not *hold* property from the date of death of his decedent, he nevertheless *acquires* that property on that date within the meaning of the Revenue Acts. The Court below has decided the question before it in a way in conflict with an applicable decision of this Court.

5. THE DECISION BELOW IS NECESSARILY IN CONFLICT WITH CALIFORNIA STATUTES AND WITH APPLICABLE LOCAL DECISIONS IN THAT IT FAILS TO GIVE EFFECT TO THE CALIFORNIA RULE THAT LEGAL TITLE TO PERSONAL PROPERTY VESTS IN THE LEGATEE FORTHWITH UPON A TESTATOR'S DEATH, THAT THAT TITLE IS IN NO WAY DEPENDENT UPON THE DECREE OF DISTRIBUTION, AND THAT AN EXECUTOR'S POSSESSION OF THE PROPERTY OF AN ESTATE IS THE POSSESSION OF THE LEGATEE.

The California statutes specifically provide that testamentary dispositions are presumed to vest at the testator's death (Section 1341 of the Civil Code of California (1920), now Section 28 of the Probate Code of California (1931); see appendix); that when a person dies the title to his property, real and personal, passes forthwith to the person to whom it is devised or bequeathed or to the person succeeding to his estate, subject only to the allowances of administration, to the payment of decedent's debts and to the possession of the executors for purposes of administration (Sections 1363, 1384 of the Civil Code of California (1920), now Section 300 of the Probate Code of California (1931); Section 1452 of the Code of Civil Procedure of California (1920), now Section 581 of the Probate Code of California (1931)).

The Supreme Court of California has given full effect to these statutory provisions. Thus, in *Western Pacific Railway Co. vs. Godfrey* (1913), 166 Cal. 346, 349, 136 Pac. 284, 285, the court adopted the following language of the District Court of Appeals:

> "That the estate of a decedent vests in his heir or devisees and legatees immediately upon his death cannot be disputed. * * *

> "Pending the administration the personal representatives of the decedent are entitled to the possession of the estate for the purposes of administration, but the title vests in the heirs or devisees and legatees, subject only to the right of possession of the personal representatives of the decedent. * * *
>
> "The legatee does not derive title from the decree of distribution, but from the will, which takes effect immediately upon the death of the testator. The decree of distribution does not create the title. It merely declares the title that accrued under and by the will. * * *"

And in *Murphy vs. Crouse* (1901), 135 Cal. 14, 17, 66 Pac. 971, 972, it was said:

> "Here both real and personal property descend directly to the heir, or to the beneficiary named in the will, with a qualified right in the personal representative, who holds it for the purposes of administration more like a receiver than like a common-law executor. The title is not in him, nor has he the power of disposal, save by order of the court."

To a like effect are *Lichtenberg vs. Burdell* (1929), 101 Calif. App. 20, 36, 281 Pac. 518, 525; *United States Fidelity & Guaranty Co. vs. Mathews* (1929), 207 Cal. 556, 559, 279 Pac. 655, 656; *In Re Yorba's Estate* (1917), 176 Cal. 166, 169, 167 Pac. 854, 855, 856; *Bates vs. Howard* (1894), 105 Cal. 173, 183, 38 Pac. 715, 718; *Spotts vs. Hanley* (1890), 85 Cal. 155, 167, 24 Pac. 738, 741.

It is submitted the decision below utterly ignores the effect of the California statutes and the above decisions when the court reaches a conclusion that a general legatee does not hold property from the date of death of his decedent. The

decision below, therefore, is in conflict with applicable local decisions.

6. THE DECISION BELOW IS IN CONFLICT WITH THE PRINCIPLE, ENUNCIATED BY THIS COURT IN HELVERING VS. BLISS (1934), 293 U. S. 144, THAT THE CAPITAL GAIN SECTIONS OF THE FEDERAL REVENUE ACTS ARE LIBERALIZATIONS OF THE LAW AND ARE NOT TO BE NARROWLY CONSTRUED.

This Court in *Helvering vs. Bliss* (p. 151 of 293 U. S.), said:

> "The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed."

It is submitted that the decision below, instead, necessarily rests upon a narrow construction of the capital gain sections of the Revenue Act of 1928.

CONCLUSION.

For the reasons stated, petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit and that this Court review the judgment of the Court below in this case.

Dated October 2, 1935.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Section 101 (a):

> In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

Section 101 (c):

> For the purposes of this title—
>
> * * * * * * * * *
>
> (8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—
>
> * * * * * * * * *
>
> (B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain

or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

Section 113 (a):

The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * * *

(5) If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

Civil Code of California (1920):

Section 1341

Testamentary dispositions, including devises and bequests, to a person on attaining majority, are presumed to vest at the testator's death.

Section 1363

In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the Superior Court to sell the property devised and bequeathed in the cases herein provided.

Section 1384

The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the Probate Court, and to the possession of any administrator appointed by that court, for the purposes of administration.

Code of Civil Procedure of California (1920):

Section 1452

The executor or administrator is entitled to the possession of all the real and personal property of the decedent, and to receive the rents and profits of the real estate until the estate is settled or until delivered over by the order of the court to the heirs or devisees; and must keep in good tenantable repair, all houses, buildings and fixtures thereon which are under his control. After the expiration of the time for the presentment of claims, he is not entitled to recover the possession of any property of the estate from any heir who has succeeded to the property in his possession, or from any devisee or legatee, to whom the property has been devised or bequeathed, or from the assignee of any such heir, devisee or legatee, unless he proves that the same is necessary for the payment of debts or legacies, or of expenses of administration already accrued; or for distribution to some other heir, devisee or legatee entitled thereto. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the possession of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do.

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 491.

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 494.

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The Memorandum Opinion of the United States Board of Tax Appeals (R. 69-78) was promulgated February 13, 1934, and is found at 29 B. T. A. 1070. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 92-95) was filed February 5, 1935, and is found at 75 F. (2d) 617. A Petition for Rehearing in that Court was denied on September 6, 1935 (R. 96).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered February 5, 1935 (R. 95). A Petition for Rehearing was

denied September 6, 1935 (R. 96). The Petition for a Writ of Certiorari was filed October 4, 1935, and was granted October 14, 1935. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938.

QUESTION PRESENTED.

Whether bonds and shares of stock acquired by petitioner, as a general legatee under the will of a decedent who died March 28, 1926, and sold or otherwise disposed of by petitioner only on dates between April 18, 1928, and December 18, 1928, may be said not to have been held for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, 45 Stat. 791, 811, merely because the decree of distribution of the estate of the decedent was not entered until May 21, 1927.

STATUTES INVOLVED.

The statutes involved are set forth in the brief of the petitioner in the case of *Rufus R. Rand, Jr., vs. Guy T. Helvering, Commissioner of Internal Revenue*, No. 439 on the October, 1935, Docket of this Court, which case involves the identical legal question involved in this case. The brief of the petitioner in the Rand case is being filed contemporaneously with this brief.

STATEMENT.

The facts are not in dispute. They were found by the Board (R. 70, 71) as stipulated by the parties (R. 15-64).

Petitioner is and at all times hereinafter mentioned was a taxpayer domiciled in the State of California (R. 16). On

March 28, 1926, Harriet deWitt Kittle, the mother of petitioner, died domiciled in the State of California leaving by will all her property to her four children, share and share alike (R. 16, 21, 22). The decedent's will was duly probated, and her estate, upon decree of final distribution dated May 21, 1927 (R. 32-52), was distributed according to the terms of the will. Petitioner received as part of her share of the estate specific stocks and bonds (R. 17-19).

At various times between April 18, 1928, and December 18, 1928, petitioner sold on the market certain of the bonds and shares of stock she had so received from her mother (R. 19, 20). It is evident that said sales were made more than two years after her mother's death but less than two years after the date of the decree of distribution of her mother's estate (R. 20). Petitioner realized gains upon said sales in the total amount of $28,441.86 (R. 21), and, in her income tax return for the calendar year 1928, computed and reported her gains upon said sales as capital gains taxable at the capital gain rates on the theory they were realized from sales of capital assets within the meaning of Section 101 (c) of the Revenue Act of 1928, 45 Stat. 791, 811 (R. 21). Respondent contended that the two year holding period contemplated in the provisions of that section commenced to run from the date of distribution and not from the date of death and consequently held that the gains were taxable as ordinary income at the normal and surtax rates and asserted a resulting deficiency of $1,690.30 in the petitioner's income tax for the calendar year 1928 (R. 64-68). The United States Board of Tax Appeals entered its decision for respondent (R. 78, 79). That decision was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit (R. 95).

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding:

1. That the bonds and shares of stock sold by petitioner were held by her, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, only from the date of distribution of the decedent's estate and not from the date of death of the decedent.

2. That the bonds and shares of stock sold by petitioner between April 18, 1928, and December 18, 1928, both dates inclusive, were not, at the time of sale, capital assets within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

3. That Section 101 and Section 113 (a) (5) of the Revenue Act of 1928 are to be read together and that basis date and acquisition date must necessarily be one and the same.

4. That the gains realized by petitioner upon the sale of said shares were not taxable at the rate applicable to capital gains but were taxable as ordinary income at the normal and surtax rates.

5. That the California rule that title to property transmitted by will vests in the legatee immediately upon the decedent's death is not material in determining the date from which the legatee holds property within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

6. That the determination of the United States Board of Tax Appeals that there was a deficiency in petitioner's income tax for the calendar year 1928 in the amount of one thousand six hundred ninety and 30/100 dollars ($1,690.30) was correct.

SUMMARY OF ARGUMENT AND ARGUMENT.

The legal question involved in this case is identical with that involved in the case of *Rufus R. Rand, Jr., vs. Guy T. Helvering, Commissioner of Internal Revenue*, No. 439 on the October, 1935, Docket of this Court, the brief of the petitioner in which case is being filed contemporaneously with this brief. We are taking the same position in both cases. For a summary of our argument and argument in this case, we refer to the summary of argument and argument contained in the brief of the petitioner in the said Rand case.

CONCLUSION.

For the reasons fully set forth in the brief of the petitioner in the said Rand case, we submit that the decision below should be reversed.

Respectfully submitted,

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FILE COPY

No. 494

In the Supreme Court of the United States

OCTOBER TERM, 1935

ISAAC K. INGLIS, PETITIONER,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 494

ISABEL K. DIBBLEE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 69–76) is reported in 29 B. T. A. 1070. The opinion of the Circuit Court of Appeals (R. 92–95) is reported in 75 F. (2d) 617.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 5, 1935. (R. 95.) A petition for rehearing filed March 6, 1935, was denied September 6, 1935. (R. 96.) The petition for a writ of certiorari was filed October 4, 1935, and

was granted October 14, 1935 (R. 98). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner, on certain dates extending from April 18 to December 18, 1928, sold stock which she had received as a general legatee under the will of her deceased mother, upon a distribution of the estate on May 21, 1927. The petitioner's mother died March 26, 1926. Was the stock "held" by the petitioner for more than two years, so that the gain on the sale thereof is taxable as a "capital net gain" within the meaning of Section 101 of the Revenue Act of 1928?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*, pp. 8–14.

STATEMENT

The facts as contained in the opinion of the Board of Tax Appeals (R. 70–71) are substantially as follows: Petitioner is an individual residing at Ross, in Marin County, California. Her mother died testate on March 28, 1926, and in her will disposed of her property, leaving "All my property, real, personal and mixed, of any kind and nature whatsoever, and wherever situate, * * * unto my four children, Lucia Hamilton Kittle Sherman, Isabel Kittle Dibblee, Allen Irvin Kittle, and John

Casper Kittle, share and share alike." The will was duly probated and the estate distributed under a decree of final distribution dated May 21, 1927, the petitioner receiving one fourth of certain stocks and bonds so distributed from the estate of her mother. Thereafter and on certain dates extending from April 18 to December 18, 1928, petitioner sold some of the securities thus acquired. These sales were made more than two years after the death of her mother, but less than two years after the date of the distribution to the petitioner of the property sold. In her income tax return for 1928 petitioner reported the profit from such sales as capital net gain in the amount of $27,712.33, based on the value of the securities at March 28, 1926. The profit based on fair market value at the time of distribution is $28,441.86. Upon audit of the return the respondent included this latter amount as ordinary income and determined the deficiency in controversy.

Further it was admitted by the petitioner before the Board of Tax Appeals that the basis for determining the gain on the sale of the securities in question was the fair market value thereof as of the date of distribution to the petitioner, the basis used by the respondent in determining the deficiency here in controversy. (R. 71.)

The Board of Tax Appeals approved and affirmed the Commissioner's determination. (R. 76.) The Circuit Court of Appeals affirmed the

order of the Board (R. 95) and subsequently denied a petition for rehearing (R. 96).

ARGUMENT

PETITIONER, HAVING RECEIVED SECURITIES AS A GENERAL LEGATEE UNDER HER MOTHER'S WILL, SUCH SECURITIES WERE HELD ONLY FROM THE DATE OF DISTRIBUTION, LESS THAN TWO YEARS PRIOR TO THE SALE THEREOF, AND THE GAIN THEREFORE IS NOT A CAPITAL NET GAIN

The Circuit Court of Appeals, affirming the Board of Tax Appeals, held that the securities which were received by petitioner as a general legatee under her mother's will on May 21, 1927, the date of distribution, were "held" by petitioner only from that date within the meaning of Section 101 (c) (8) of the Revenue Act of 1928. Therefore, that portion of the securities so received which were sold between April 18 and December 18, 1928, had not been "held" for a period of two years. Consequently the gain was held to be an ordinary one rather than a capital net gain taxable at the lower and flat rate of 12½ percent. The petitioner contends that her period of holding commenced on March 28, 1926, the date of her mother's death, and that consequently the securities constituted capital assets in her hands at the time of the sale thereof. We submit that the decision below is correct and that the petitioner's contentions are erroneous.

Section 101 (c) (8) of the Revenue Act of 1928, *infra*, provides that at the election of the taxpayer

the tax on net gains from the sale of capital assets may be taxed at 12½ percent (instead of at the ordinary normal and surtax rates) and defines the term "capital assets" as "property *held by the taxpayer* for more than two years." (Italics supplied.) It is further provided that in determining the period for which the taxpayer has held property there shall be included the period for which the property was held by any other person if under Section 113 the basis for determining gain or loss on a sale of the property in the hands of the taxpayer is the same as it would have been in the hands of such other person. (Subdivision (c) (8) (B), *infra.*) Section 113 (a) of the Revenue Act of 1928, *infra,* so far as material here, provides that the basis for determining gain or loss on a sale of property *acquired* after February 28, 1913, shall be the cost thereof, with certain exceptions. Subdivision (a) (2) provides generally that if the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor. Under Subdivision (a) (5) the basis prescribed for real property acquired by general or specific devise or intestacy, and of personal property acquired by an estate from the decedent, is the value thereof at the date of decedent's death. In all other cases of property acquired either by will or intestacy, however, which include general or residuary bequests, the basis specified is the value of the property *at the time of the distribution to the taxpayer.*

The securities here in question were distributed by the executor to the petitioner on May 21, 1927. Within less than two years thereafter she sold them. The sale was made more than two years after the death of the testatrix. The petitioner received the securities as a general legatee. It is not disputed that the basis for determining the gain on the sale is "the fair market value of the property at the time of the distribution to the" petitioner under Section 113 (a) (5) of the Revenue Act of 1928. The question, therefore, is whether the date for fixing the basis under Section 113 (a) (5) is also the date which marks the beginning of the period of holding under Section 101 (c) (3) of the Act. This question is now before this Court in the following cases: *McFeely* v. *Helvering,* No. 24, October Term, 1935, certiorari granted, May 20, 1935. In that case the taxpayer was a donee of a widow who elected under the laws of Pennsylvania to take against the will of her deceased husband. In *United States* v. *First National Bank of Boston,* and *Helvering* v. *Lee,* Nos. 110 and 111, respectively, October Term, 1935, certiorari granted, October 14, 1935, the taxpayers were residuary legatees. In *Ogle* v. *Helvering,* and *Rand* v. *Helvering,* Nos. 137 and 439, respectively, certiorari granted, October 14, 1935, the taxpayers took under intestacy laws.

Our reasons for urging the affirmance of the decision below in the instant case are the same as the reasons advanced on pages 12 to 35, inclusive, of

respondent's brief heretofore filed in the *McFeely* case. For the convenience of the Court, and in order to prevent repetition, we respectfully invite the Court's attention to that argument and incorporate the same herein, at this point, by reference. Copies of the respondent's brief in the *McFeely* case have been served with this brief on petitioner's counsel herein.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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OCTOBER, 1935

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 815, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other

person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property;

* * * * *

(2) *Gift after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it

would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner:

(3) Transfer in Trust after December 31, 1920.—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired

either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *.

Treasury Regulations 74:

ART. 596. *Property transmitted at death.*—In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with

the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of th rticle, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

S. Rep. 960, 70th Cong., 1st Sess. (p. 26):

Accordingly, the committee has revised section 113 (a) (5) and certain related sec-

tions, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases, it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

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SUPREME COURT OF THE UNITED STATES.

Nos. 24, 110, 111, 439, and 494.—October Term, 1935.

Nancy K. McFeely, Petitioner, 24 *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
The United States of America, Petitioner, 110 *vs.* The First National Bank of Boston, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 111 *vs.* Frances G. Lee.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
Rufus R. Rand, Jr., Petitioner, 439 *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
Isabel K. Dibblee, Petitioner, 494 *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 11, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

These cases were brought here on writs of certiorari to resolve a conflict between Circuits with respect to the application of Section 101 of the Revenue Act of 1928,[1] which permits taxpayers, at their option, to pay at the rate of twelve and one-half per cent on capital net gains. Subsection (c) (8), so far as material, is: "'Capital assets' means property held by the taxpayer for more than two years . . . ." Whether property acquired from a decedent through intestacy, or a general bequest, is, within the meaning of the clause, held by the taxpayer from the date of the de-

[1] C. 852, 45 Stat. 791, 811.

cedent's death or from the date of distribution, is the matter in dispute.

The taxpayers are: in Nos. 110, 111, and 494, residuary legatees, in No. 24 the donee of a widow who elected to take against her husband's will, and in No. 439 one of those entitled under the intestate laws. In each case the taxpayer sold the asset more than two years after the death of the decedent from whom title was derived but less than two years after distribution by the estate's representatives. In each a return was made of the profit on the sale as capital net gain taxable at twelve and one-half per cent, but the Commissioner refused to recognize the correctness of the returns and calculated the tax at the normal and surtax rates payable on ordinary income.

The Board of Tax Appeals sustained the Commissioner in four of the cases.[2] In No. 110 the tax was paid and judgment recovered in a suit for refund.[3] The Circuit Courts of Appeals of the Third, Eighth, and Ninth Circuits affirmed the action of the Board; that of the First Circuit reversed the Board in No. 111 and affirmed the judgment of the District Court in No. 110.[4]

The Commissioner contends that until actual distribution property cannot be said to be held by one having an interest in a decedent's estate, and, even if this be not true, Section 113 (a) (5), making value at the date of distribution the basis for calculating gain in such cases, requires that the word "held" in Section 101 (a) (8) be construed to set the same date as the time at which the holding shall begin.

The taxpayers on the other hand assert that property is, in contemplation of law, held from the date of acquisition and one deriving property from a decedent's estate through devise, bequest or intestacy acquires the property at the date of death and holds it from that date; that so all prior acts using similar phraseology have been interpreted by the Treasury; that the re-enactment of these without significant change constitutes a legislative confirmation of the administrative interpretation; and that Section 113,

[2] 29 B. T. A. 998; 29 B. T. A. 1070. Two of the Board's decisions are not reported.

[3] 7 F. Supp. 915. 79 F. (2d) 24;

[4] 74 F. (2d) 1017; 76 F. (2d) 200; 76 F. (2d) 203; 75 F. (2d) 617. The opinion of the Circuit Court of Appeals of the Eighth Circuit is not reported.

having to do with the basis for the calculation of the tax, cannot alter the plain meaning of Section 101 which prescribes the length of time property must be held to constitute it a capital asset. We conclude that the date of the decedent's death is that from which the period of holding should be computed.

In the Revenue Act of 1921, the first which granted a special rate of tax on capital net gain, Section 206 (a) (6) defined capital assets as "property acquired and held by the taxpayer . . . for more than two years."[5] From the corresponding sections of the Revenue Acts of 1924, 1926, and 1928, the word "acquired" was omitted. "Acquired" in the phrase "acquired and held" was mere surplusage and doubtless was elided from the later acts for that reason.[6] As indicated in *Helvering* v. *New York Trust Company*, 292 U. S. 455, 469, the omission did not change the meaning of capital assets as defined in the earlier act.

In common understanding to hold property is to own it. In order to own or hold one must acquire. The date of acquisition is then, that from which to compute the duration of ownership or the length of holding. Whether under local law title to personal property passes from a decedent to the legatee or next of kin at death subject to a withholding of possession for purposes of administration,[7] or passes to the personal representative for the purposes of administration,—the title of the beneficiary, though derived through the executor, relating back to the date of death,[8]—is for present purposes immaterial. In either case, the date of acquisition within the intent of the Revenue Act is the date of death.[9]

The Commissioner has heretofore administered the section upon this theory. As respects the Revenue Act of 1921, he so ruled in

[5] 42 Stat. 233.

[6] *First National Bank* v. *United States*, 76 F. (2d) 200, 202.

[7] The taxpayers in Nos. 24, 110, 111 and 439 contend that such is the law in Pennsylvania, Massachusetts, New Hampshire and Minnesota, where the devolutions in those cases respectively occurred. See *Roberts* v. *Messinger*, 134 Pa. 298, 309; *Lathrop* v. *Merrill*, 207 Mass. 6, 10; *Carter* v. *Whitcomb*, 74 N. H. 482, 484; *Granger* v. *Harriman*, 89 Minn. 303. The opinion of the Circuit Court of Appeals in No. 494 discloses that the taxpayer asserted that the law of California was the same. The Court, however, did not discuss or decide the point, and we are referred to no pertinent authorities.

[8] See *Brewster* v. *Gage*, 280 U. S. 327, 334, and cases cited.

[9] *Brewster* v. *Gage*, (*supra*). The question there decided arose under the Act of 1921 and was distinct from that now presented; but as concerns date of acquisition, which necessarily determines duration of holding, the decision is authority here.

1923,[10] and again in a very full memorandum in 1924.[11] It was stated in briefs and at the bar that these rulings have never been cancelled or revoked, and the statement was not challenged. The repetition of the definition without material change in the subsequent acts, including that of 1928, amounts to a confirmation of the administrative interpretation.[12] There is nothing in the section, its history, or the administrative practice, to enlarge or alter the connotation commonly ascribed to the word "held".

The Commissioner says, however, that Congress has undoubted power to set the date of distribution as the terminus *a quo* and that an examination of the whole statute discloses that the purpose was to alter the preexisting rule to that end.

In support of this argument it is pointed out that Section 113, which prescribes the basis for determining capital gain or loss, radically altered preexisting law on the subject in such a way as to show an intent to change the normal meaning of the word "held" in Section 101 (c) (8). In the Revenue Acts of 1924 and 1926 the sections dealing with the basis for calculating capital gain or loss provided that in the case of property acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition.[13] As we have seen, in common understanding, with which the administrative interpretation was in accord, the time of acquisition in such cases is the time of the decedent's death. The date for ascertaining the basic value, and the date of commencement of the two year holding period were, therefore, under these Acts, identical. Committee Reports indicate that by reason of doubt as to what is in fact the moment of acquisition by persons having various relations to a decedent's estate, Congress resolved arbitrarily to fix the basis for the calculation of capital gain or loss.

In consequence the Act of 1928, for the language used in the earlier acts, substituted this:

"Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by

[10] I. T. 1600, C. B. II-1, p. 36; I. T. 1719, C. B. II-2, p. 45.

[11] I. T. 1889, C. B. III-1, p. 70. He had made the same ruling under the Revenue Act of 1918: O. 1012, C. B. No. 2, January-June 1920, p. 34. And he so ruled in answer to an inquiry respecting the 1921 Act: Prentice Hall Tax Service, 1923, 2703-4.

[12] *Helvering* v. *Bliss*, 293 U. S. 144.

[13] R. A. 1924, Sec. 204 (a) (5), 43 Stat. 258; R. A. 1926, Sec. 204 (a) (5), 44 Stat. 14.

general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." [§ 113 (a) (5).]

No change was made in the phraseology of Section 101 (c) (8) from that used in prior acts defining capital assets as "property held by the taxpayer . . . for more than two years". The argument for the Commissioner is that the alteration of the basis date necessarily implies an intent to make a similar alteration in the origin date of the holding period. We think the argument cannot prevail. The Committee Reports disclose no purpose to alter the rule laid down in the earlier statutes and reenacted in Section 101 (a) (8). Congress must be taken to have been familiar with the existing administrative interpretation. The fact that the two sections deal with the same general subject—capital gains—is cited in support of the Commissioner's position that they ought to be consistently applied. There is, however, nothing novel in the naming of arbitrary "basis" dates differing from the admitted dates of acquisition. The outstanding example is the use of March 1, 1913, value in certain cases for property theretofore acquired. Indeed sub-paragraphs (A), (B), and (C) of Section 101 (c) (8) fix arbitrary dates for calculation of the period of holding of capital assets which differ from the time of actual acquisition, showing that Congress, had it desired to change the connotation of the word "held", as used in Section 101 (c) (8), could readily have done so.

Counsel urge that *Helvering* v. *New York Trust Company* (*supra*), requires us to construe Section 101 (c) (8) as fixing the same date for the beginning of the holding period as Section 113 (a) (5) sets for determining the basis. We think, however, that the case is not authority here. The Act of 1921 exhibited an inconsistency in that while a donee was permitted to tack his tenure to that of his donor, he was ~~not permitted~~ NOT required to use his donor's basis. This inconsistency flowed from a literal reading of the separate sections dealing with these two subjects. Such a result the court

held would run counter to the very policy and purpose of the capital gains rate reduction, which was to encourage sales of capital assets, and would penalize the taxpayer making such sales. The departure from the strict terms of the act was justified in order to secure him the benefit intended to be conferred. The court was careful to say "The rule that where a statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one . . .". That rule was held inapplicable for the reasons stated.

Here the rule obtains that a taxing statute, if of doubtful intent, should be construed favorably to the taxpayer.[14] To depart from the literal meaning of Section 101 (c) (8) would be to penalize the taxpayer by lengthening the period during which the capital asset must be held in what is really a single ownership to obtain the advantage of the reduced tax. Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express.

The instant case is much closer to *Helvering* v. *Bliss*, 293 U. S. 144, where the Government asserted that a section in terms applicable to the taxpayer's right to make a deduction from gross income should be modified in meaning and effect by another dealing with a related topic,—related in the sense that both sections bore on the ultimate amount of the tax—independent, however, in the sense that one related to the deduction permitted in ascertaining taxable income, while the other fixed the rate of tax on a portion of such income. We refused to modify the obvious meaning of the applicable section to accord, as was claimed, with the other.[15]

A further argument of the Commissioner is that, since under Section 101 (c) (8) (B) the period for which the taxpayer has held property, however acquired, is to include any period during which such property was held by any other person if, under Section 113, the property has, for purposes of determining gain or loss, the same basis in the taxpayer's hands as it would have in the hands of such other person, it is impossible to construe Sec-

[14] *Crooks* v. *Harrelson*, 282 U. S. 55, 61.

[15] Compare *Helvering* v. *Twin Bell Syndicate*, 293 U. S. 312, where the taxpayer's plea for modification of the meaning of one section based upon the inconsistency with another was denied. In that case both sections had to do with depletion, the one with the calculation of the amount thereof, the other with the apportionment of depletion between the lessor and lessee.

tion 101 independently of Section 113. It is said that Congress has clearly indicated the successor in title should not have the benefit of his predecessor's tenure when he was not required to use the predecessor's basis, and, therefore, tenure and basis are so connected in the two sections that the one may not fairly be construed without reference to the other. The argument is not convincing.

The reference in sub-paragraph (B) is not to paragraph (a) (5) of Section 113 but to the entire section which embodies a number of instances of the arbitrary fixing of basis dates for ascertaining capital gain or loss. Sub-paragraph (B) has, on its face, no relevance to the facts in the cases here for decision.

We are of opinion that Section 101 (c) (8) is clear on its face; that it deals solely with the tenure necessary to claim a rate of twelve and one-half per cent on capital net gain as distinguished from the normal and surtax rate upon ordinary gain; that Section 113 (a) (5) deals only with the basis for the calculation of the tax in cases falling under Section 101 (c) (8); that the sections are not inconsistent and that each should be read as affecting the subject to which alone it applies.

No. 24. Judgment reversed.
No. 110. Judgment affirmed.
No. 111. Judgment affirmed.
No. 439. Judgment reversed.
No. 494. Judgment reversed.

Mr. Justice BRANDEIS, Mr. Justice STONE and Mr. Justice CARDOZO think that the judgment in each of these cases should go for the Government on the ground succinctly stated in the opinion of the Circuit Court of Appeals of the Second Circuit, in *Ogle* v. *Helvering, Commissioner*, 77 F. (2d) 338.

A true copy.

Test:

Clerk, Supreme Court, U. S.